TRANSCRIPT OF RECORD,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. ~~100~~ 12

BEREA COLLEGE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 7, 1908.

(20,511.)

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SUPREME COURT OF THE UNITED STATES

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No. 546.

BEREA COLLEGE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

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1 Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 12th day of June, 1906.

BEREA COLLEGE, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Madison Circuit Court.

Be it remembered that heretofore to-wit on the 17th day of March, 1905, the appellant by its attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record which is in words and figures as follows:

2 *Venue. Pleas.*

STATE OF KENTUCKY, *Madison Circuit Court, sct:*

Pleas before the Hon. J. M. Benton, Judge of the Madison Circuit Court, at the court house, in the City of Richmond, Ky., on the 21st day of February, 1905, in the action of

No. 6009.

Parties:

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BEREA COLLEGE, Defendant.

Be it remembered that heretofore, to wit: On October 8th, 1904, the Grand Jury of Madison County filed an indictment in the clerk's office of said court, to wit:

Indictment.

Madison Circuit Court.

THE COMMONWEALTH OF KENTUCKY
against
BEREA COLLEGE.

Operating a School for Whites and Negroes.

3 The grand jury of Madison county, in the name and by the authority of the Commonwealth of Kentucky, accuse Berea College of the offense of maintaining and operating school for whites and negroes committed as follows, viz: That said Berea College on the 8th day of October, 1904, in the county afore-

said and before the finding of this indictment, it the said Berea College being a corporation duly incorporated under the laws of the State of Kentucky, and owning, maintaining and operating a college, school and institution of learning known as Berea College, located in the town of Berea, Madison County, Ky., did unlawfully and wilfully permit and receive both the white and negro races as pupils for instruction in said college, school and institution of learning, against the peace and dignity of the Commonwealth of Kentucky.

B. A. CRUTCHER,
Commonwealth's Attorney.

Witnesses:
Miss DOUGLAS.
Mr. A. BROCK.

Presented by the Foreman of the Grand Jury to the Court in the presence of the Grand Jury and received from the Court by me and filed in open Court.
Oct. 8th, 1904.

ROY C. WHITE, *Clerk.*

October Term, 29th Day of October, 1904.

4 6009.

COMMONWEALTH OF KENTUCKY
vs.
BEREA COLLEGE.

Demurrer.

The defendant demurred to the indictment herein.

February Term, 7th Day of February, 1905.

COMMONWEALTH
vs.
BEREA COLLEGE.

Order Overruling Def't's Demurrer.

This cause came on and was heard on defendant's demurrer to the indictment and the court being fully advised, it is ordered that said demurrer be and is overruled, to which defendant excepts.
The court filed an opinion herein.

Opinion.

Madison Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BEREA COLLEGE, Defendant.

Opinion.

At the October Term, 1904, of this court the Grand Jury found and returned an indictment against the defendant, Berea College, charging it with a violation of the law passed at the session
5 of 1904 of the General Assembly of Kentucky, which law is commonly known as the Day Bill, and is entitled as follows: "An act to prohibit white and colored persons from attending the same school."

The first section of the act provides: "That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school or institution, shall be fined $1000.00, and any person who may be convicted of violating the provisions of this act shall be fined $100.00 for each day they may operate said school, college or institution, after such conviction."

The fourth section of the act provides that: "Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty five miles distant, for the education exclusively of one race or color."

The indictment in this case was found under the first sec-
6 tion of the act. To the indictment the defendant college has interposed a demurrer, and in the argument upon the demurrer counsel for the defendant have vigorously assailed the validity of the act urging with much force that it contravenes several of the provisions of the Bill of Rights contained in the State Constitution, and also the first section of the Fourteenth Amendment to, and possibly some other provisions of the Constitution of the United States.

In addition to these objections of substance some technical criticisms of the indictment are offered which will be first considered and disposed of before the more serious objections to the indictment are discussed.

It is suggested that, conceding the validity of the act, the indictment is not properly drawn to cover any offense defined in the act. This criticism is not well founded. The act makes it unlawful for any corporation to maintain or operate a college, school or institution where persons of the white and negro races are both received as pupils for instruction, and this indictment, in almost the exact

language of the act, charges that Berea College being a corporation and owning, maintaining and operating a college, school and
7 institution of learning, known as Berea College, located in the town of Berea, Madison County, Kentucky, did unlawfully and wilfully permit and receive both the white and negro races as pupils for instruction in said college, school and institution of learning.

The fair meaning and intendment of this language is that the defendant received both races in one and the same college located in the town of Berea? It does not require a very violent stretch of judicial knowledge for the court to know that there could not be a separate or distinct branch of the college, as much as twenty five miles distant from the main college, and yet be in Berea.

The suggestion is made that possibly the indictment is defective because it does not expressly state that the defendant does not come within the exception made by section 4 of the act. Such an allegation is not necessary. In the case of Com'th *v.* McClanahan, 2 Met., 8, our Court of Appeals said: "It is well settled that where provisos and exceptions are contained in distinct clauses it is not necessary to aver in the indictment that the defendant does not come within the exceptions, or to negative the provisors it contains."

It is the opinion of the court therefore that a commission
8 of the offense sought to be reached by the indictment is sufficiently alleged.

The court is further of the opinion that the defendant college is directly affected by the act in question, and that it, therefore, is in a position to properly raise the constitutional questions which arise under the act.

It is forcibly urged by counsel for the defendant, as before stated, that the act under consideration not only violates many of the provisions of the Bill of Rights contained in the Constitution of Kentucky, but that it also violates the first section of the Fourteenth Amendment to and possibly other sections of the Constitution of the United States.

The sections of the Bill of Rights which it is urged this act violates are those which secure to all citizens the right of enjoying and defending their liberty, the right of worshipping Almight- God according to the dictates of their consciences, the right of seeking and pursuing their safety and happiness, the right of freely communicating their thoughts and opinions, the right of acquiring and protecting property, and the right to freely and fully speak, write and print on any subject.

9 The attention of the court is called also to section 26 of the State Constitution which reads as follows: "To guard against transgression of the higher powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution shall be void."

If the act under consideration can be upheld it must be upon the ground that its enactment by the Legislature was a legitimate and

proper exercise of the police power of the state by that department of the State Government.

At first blush it may seem that section 26 of the Constitution just quoted was intended to take away from the Legislature the power to exercise this police power in all cases where the exercise of it would impair or tend in any way to impair or infringe any of the rights guaranteed by the Bill of Rights. That section 26, however, is not peculiar to the present Constitution of Kentucky. It is found in the first, second and third Constitutions of the State which were adopted respectively, in 1792, 1799 and 1850, so that to give
10 that section the meaning for which the defendant's counsel contend would place the Legislature of Kentucky, with reference to its power to exercise the state's police power, in a position peculiar alone to this State, and which condition must have existed since the formation of the original state government.

The court is of the opinion, that section 26 of the Constitution does not deprive the Legislature of the power to enact such measures as come fairly and legitimately within the exercise of the police power which is inherent in all State governments. That right exists as fully in Kentucky as it does in any other state in the Union. The right is not dependent for its existence upon express constitutional sanction.

"Where the letter of the Constitution would prohibit police regulations which by all the principles of constitutional government have been recognized as beneficient and permissible restrictions upon the individual liberty of action, such regulations will be upheld by the courts on the ground that the framers of the Constitution could not possibly have intended to deprive the government of so salutory a power, and hence the spirit of the Constitution permits such legislation although a strict construction of the letter *per*hibits."
11 Tiedeman's Limitation of Police Powers, p. 212.

"All authorities agree that the Constitution presupposes the existence of the police power, and it is to be construed with reference to that fact," 2 Hare's American Constitutional Law, 766.

The court will not attempt in this opinion to take up seriatim the various sections of the state Constitution or of the Constitution of the United States relied upon by the defendant and discuss the bearing of each of them on the legislation which is now assailed by the defendant, but before the opinion closes several decisions of the Supreme Court of the United States, and of the state courts of last resort, and the views of eminent text writers will be cited wherein the police power of the state governments, its extent and application, and the effect upon it of such constitutional provisions as are relied upon by defendant's counsel have been fully discussed.

The first section of the Fourteenth Amendment to the Constitution of the United States reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdic-
12 tion thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The argument presented by defendant's counsel in support of their contention that the Day Bill contravenes the inhibitions found in the first section of the Fourteenth Amendment may be summarized as follows:

First. It would abridge the privileges and immunities of citizens of the United States.

(A) The trustees of the corporation—their privilege to expend their own money and their labor in the establishment and maintenance of a private institution for a worthy object would be abridged.

(B) Each and every teacher in the United States—his or her right to pursue in Kentucky the innocent and laudable occupation of teaching would be abridged.

13 (C) Each and every person in the United States—his or her right to seek instruction, elevating in character, wherever he or she sees fit, and upon invitation, voluntarily to associate, in so far as it may be necessary for the purpose of receiving an education, with any person of good moral character, with whom he may so desire to associate.

Second. By its enactment the State of Kentucky would seek to deprive persons of their liberty and property without due process of law.

(A) Teachers—The right to earn one's living in the pursuit of a lawful calling not interfering with the rights of others, a property right.

(B) Pupils—the right to prepare one's self to earn a living by seeking an education where the opportunity offers and none objects to his presence—a property right.

(C) The Trustees—the right to establish and maintain a school is a property right.

14 (D) The College—By rendering some of its donations subject to forfeiture, a direct pecuniary loss would be sustained.

Third. By its enactment the State of Kentucky would seek to deny persons within its jurisdiction of the equal protection of the laws.

The court is of the opinion that the validity of the act of the Legislature which is being considered and the consequent determination of the questions raised by the defendant's demurrer depend wholly upon the question as to whether the action of the General Assembly in passing the act in question was a legitimate and proper exercise of the internal police power which is the inherent right of all states.

The idea which influenced the Legislature to pass the act must have been that the association, whether voluntary or involuntary, of the persons of the negro and white races in the intimate relation which could reasonably be expected to follow from their being received together as pupils to be educated in the same institution, at the same place and at the same time, was inimical and detrimental to the public peace and morals, and hurtful to society. If such a

view on the part of the Legislature was a reasonable one, the
15 Legislature in question cannot be held to be an unwarranted exercise of the police power. The real question is, was the possible danger to the public peace, morals, and to the welfare of society from such an association so obvious that the Legislature could reasonably anticipate such danger, and therefore be warranted in taking this step to avoid it.

This act does not prevent the teachers in Berea College from exercising their calling even in that institution. Their calling is teaching. Notwithstanding this act, they can teach at all times and in all places, except only that they are prohibited from teaching in any educational institution where members of both races are received together as pupils.

No boy or girl is denied the right to go to school. The two races are simply prohibited from going to school together.

The Trustees are not prohibited from establishing and maintaining schools. If they want to establish and maintain a school for the colored youth they can do it; and if they at the same time want to establish and maintain a school for the white youth they can do it, but if one school is to be a branch of or connected with the other they must be twenty five miles apart. The trustees are pro-
16 hibited simply from establishing and maintaining a mixed school for the education of the two races.

The exercise of the calling of those who teach, the right of the students, and the right of the college to acquire and protect its property must all submit to such reasonable regulations as are deemed proper by the Legislature in the exercise of the police power of the state.

Due process of law and the law of the land are synonymous and the police power is a part of the law of the land. It cannot be said therefore that the exercise of the police power is a taking of property without due process of law. Justice Bradley in 111 U. S., 746, said, "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; and among these are life, liberty and pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Further, he said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings
17 of life—is one of the privileges of a citizen of the United States." Justice Peckham in 165 U. S., 580, after referring to these statements of Justice Bradley said: "The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word 'liberty' as used in the Amendment, but we do not intend to hold that in no such case can the state exercise its police power. When and how far such power may be legitimately exercised with regard to these subjects may be left for determination to each case as it arises."

"The constitutional guaranty is, that no person shall be deprived

of life, liberty, or property without a due process of law; but a valid exercise of the police power does not deprive any person of life, liberty or property without due process of law." State *vs.* Holden, 14 Utah, 718.

Chief Justice Shaw of Massachusetts in the case of Comth. *vs.* Alger, 7 Cush. 85, said: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as
18 the Legislatures, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property to public use whenever the public exigency requires it,—which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the public power—the power vested in the Legislatures by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the source of this power than to mark its boundaries, or to prescribe limits to its exercise."

"The constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, do not limit and were not intended to limit the subjects upon which the police power of a state may be lawfully exerted, for these guaranties have
19 never been construed as being incompatible with the principle, equally vital, because so essential to peace and safety, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 22 A. & — Ency. of Law, (2 Ed.,) 937.

The Supreme Court in Powell *vs.* Pennsylvania, 127 U. S., 678, says: "It is scarcely necessary to say that if this statute (An Oleomargarine Statute) is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with the Fourteenth Amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with that power by the states."

Counsel for the defendant propound this question: "Is it competent for the legislature to deny the freedom of speech merely because the audience consists of persons of different colors or different races, when the words spoken and the lessons read or recited are entirely free from objection?" Similar questions were propounded by Justice Harlan in his dissenting opinion in the case of Plessy *vs.* Ferguson,
20 163 U. S. 537, and the answer given by the majority of the court to such questions in that case furnish a complete answer to the question now propounded by defendant's counsel. The ma-

jority of the court said to Justice Harlan: "The reply to all this is that every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith, and not for the annoyance or oppression of a particular class."

The constant and daily association of the members of the two races must have been deemed by the Legislature to be the source of danger, and that is manifestly what was intended to be prevented by the adoption of this statute.

Counsel for defendant suggest that "that to sustain the validity of this legislation as a proper exercise of the police power, the court must know, outside of the statutes and outside of the indictment, that the operation and maintenance of such a school is detrimental to the public peace, health, morals or safety." The answer to this suggestion is that such a rule does not obtain and has never been required in the cases growing out of what are commonly known as
21 *Separate Coach Bills*, which are founded upon the same general principle or policy. There is nothing in the language of those statutes to show that it is detrimental to public peace, health, morals or safety, in the two races riding together in the same railway coaches, nor has it ever been held necessary to make such an allegation in any indictment drawn under one of those statutes.

The real question is whether or not the legislation is clearly beyond the province of the lawmakers. If it is not, their action is conclusive. The public policy of the State of Kentucky on this and kindred questions is given expression in section 187 of the Constitution which requires that separate schools shall be maintained for white and colored children, in subsection 7 of section 4521A of the Kentucky Statutes, which provides that no white child shall be permitted to attend or become a pupil in any school for colored children, and that no colored child shall be permitted to attend or become a pupil in any school for white children, in subsection 2 of section 2099 of the Statutes which prohibits marriage between a white person and a negro or mulatto, and in section 795 of the Statutes
22 which requires railway companies to furnish separate coaches for the travel or transportation of white and colored passengers.

The validity of these provisions is not at this day questioned. No court has ever denied their validity, and they have been uniformly upheld upon the grounds of public policy, and as being a proper exercise of the police power. These regulations are based upon racial differences, and if such differences warranted that legislation, why will they not warrant this? If the State of Kentucky is by constitutional provision prohibited from maintaining mixed schools because in the judgment of the framers of the Constitution the comfort, the welfare, the morals, the peace of society might thereby suffer, can it be that the state has not the right to prohibit any of its citizens from violating this state policy? In the case of L. & N. R. R. Company *vs.* Kentucky, 161 U. S., 667, the Supreme Court in affirming a decree of the Kentucky Court of Appeals said: "The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and

in the exertion of such power the legislative control is vested
23 with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry."

The Kentucky Court of Appeals, through Judge O'Rear in the case of Union Central Life Ins. Co. *vs.* Spink, 26 Ky. L. R., 1210, said: "Each state necessarily establishes its own public policy, confined to its own territory. That they may not be uniform throughout the Union is neither surprising nor discouraging, for what may be deemed inimical by one may be treated as immaterial by another, and indeed may be so."

In view of this recognized policy of the state of Kentucky, and the rule announced by the Supreme Court it is extremely difficult to see why the act now being considered does not come fairly within the purview of this policy and this rule. If any danger to the peace, the morals or the comfort of society attends the act of members of the two races riding together in the same railway coaches, or grows out of the association of the youth of the two races in attending together the same public school, can it be certainly said that no possible danger can result from the members of both races being brought into constant contact and into the most intimate social association in the same classes, in the same school room, under the same teachers, in the same private school?

Some question is made to the effect that the require-
24 ment in the fourth section of the act which requires a separate of branch school for the education of the other race or color to be twenty five miles away is an unreasonable requirement, and therefore invalidates the entire act. Attention is called to the fact that the public schools maintained for the two races are not required to be separated by that distance. If it be conceded that the main question affected by this legislation was a proper one for legislative control, then the Legislature necessarily had the power to make its action with reference to that question effective. The purpose sought to be accomplished by this legislation could have been easily frustrated if the act had permitted both races to be received in different rooms in the same building, or even in different buildings in the same immediate vicinity, under the same instructors and under the same control and management. The objectionable *constant contact* and *intimate association* could have continued. In order to make its legislation effective for the accomplishment of the purpose which prompted it, and to certainly avoid the danger sought to be prevented, the Legislature had the right to exercise some discretion in fixing the
25 distance within which the same institution should not undertake the education of both races, and unless the distance so fixed is both arbitrary and unreasonable the judgment of the Legislature must prevail. It is the opinion of the court that it cannot be judicially said that the distance of twenty five miles, as fixed in the Statute, is both arbitrary and unreasonable. From the very necessities of the case the public schools for the benefit of the two races can not be separated to the extent of twenty five

miles or any other substantial distance. The white and colored children, however, in the public schools are not under the same teachers, and there is nothing to throw the children of the two races together, or to bring them into that intimate association which was evidenly deemed by the Legislature to be detrimental to the public peace and morals of the state, and the comfort of its citizens.

A further suggestion is made that this act violates the charter rights—the vested rights of the defendant. An examination of the charter of the college shows that there was absolutely nothing in the original articles of incorporation that indicated a purpose on the part of its founders to conduct a mixed school at
26 Berea. The college was never chartered by the General Assembly of Kentucky. In July 1899, certain articles of incorporation were agreed to by the persons associated in the enterprise, and in 1866 those original articles, with two others, were for the first time made a public record, and they were then recorded in one of the Deed Books of the Madison County Court. Not until June, 1899, was it ever expressly stated in any article of incorporation that the object of the institution was "the education of all persons who may attend."

Even charter rights however are subject to the police power of a State. In the case of Lakeshore & M. S. R. Co. *vs.* Ohio etc., 43 U. S., 702, the Supreme Court says: "In our opinion the power whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution, or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which na-
27 tional legislation can be constitutionally extended."

"Rights and privileges arising from contracts with the state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations." 22 A. & E. Ency. of Law, (2 Ed.) 938.

Defendant's counsel contend that the act in question is unreasonable and absured and therefore void, and in support of that contention they give this illusfration: "Take for instance, the Methodist or the Roman Catholic Church. Such church is an institution. Suppose such church received in its Sunday school, as it does, in Louisville, white children, and in another building in the same city, or in any town in all Kentucky negro children, it would be guilty of violating the first section of the Act, and would not be saved by the proviso of section four, for that applies only to institutions of learning." And again they say: "Therefore the Methodist or the Roman Catholic Church, if it maintains a
28 white Sunday school in any town in Kentucky can not maintain a colored Sunday school in the same town or any other

town or place in all Kentucky." The answer to these suggestions is that the construction given the act must be a reasonable one. The title to the Act is: "An Act to Prohibit White and Colored Persons from attending the same school." The term school must be given its usual and ordinary acceptance, and it is doubtful if a Sunday School comes within the terms of the Statute. It is entirely competent to resort to the title to ascertain the true meaning of an Act. Formerly the titles of legislative acts were not regarded as any part of them. But in the case of Comth. *v.* Barney, 24 Ky. L. R., 2352, the Court says: "To prevent certain abuses of legislation by the use of misleading titles, many of the states now have constitutional provisions identical with or quite similar to our section 51. So that the matter of selecting an expressive and accurate title is committed directly to the Legislature, and its being fairly expressive of the context of the bill is an imperative condition to the validity of the act. It is essentially a part of the
29 act, not only because it has been selected and adopted by the Legislature as one of the tests of their meaning as expressed in the bill, but because the Constitution has made it a part, and the controlling part of the law to which it applies. It is therefore not only useful, in affording a fair index of the legislative intent in case of ambiguity in the context, but it must be read in connection with the remainder of the act—as a part of it—in determining what is the law."

The final, and it seems to the court the strongest ground, upon which the defendant bases its contention that the act under consideration is void, is that while the laws requiring the separation of the two races in public schools and on common carriers have been recognized and upheld as coming within the police power of the state on the ground that a state may determine that an *enforced association* of the two races is inimical to the general welfare; no law has ever been enforced which punishes as a crime the *voluntary association* of the two races, in a *private enterprise*. The welfare of the state is what the Legislature considers
30 when it comes to exercise the police power, and if an enforced association of the races is so injurious to the welfare of the state as to warrant a prohibition, may it not be reasonably inferred that a voluntary association of the races will prove so hurtful to the welfare of the state as to warrant the state to revoke its police power to prevent it such injury.

Judge Du Relle, in his separate opinion in the case of the Ohio Valley Railway's Rec. *vs.* Lander, etc., 20 Ky., L. R. 913, used this language:

"It seems to me indisputable that whatever a carrier of passengers may do by regulation the government of the state may, in the exercise of its inherent police power, by law require the carrier to do." In the case of Clark *vs.* Maryland Institute for Promotion of Mechanic Arts, 41 Otl. 126, a case cited by defendant's counsel, it was held by the Court of Appeals of Maryland that the institute had the right to refuse colored pupils. The City of Baltimore was entitled, by contract, to designate thirty three pupils to attend the institute.

The privilege was accorded to each member of the City
31 Council to name a pupil from his ward in order to make up the total thirty-three. A youth of African descent was received into the institute as a pupil in 1891, another in 1892, and two others in 1895. In the language of the Maryland Court, "the effect of these four pupils was very disastrous. There was an immovable and deep settled objection on the part of the white pupils to an association of this kind. Notwithstanding earnest and zealous efforts on the part of the Board of Management and faculty of teachers to reconcile the white pupils, their parents and guardians to the innovation, it caused a great decrease in the number of pupils. Finally the Board of Managers adopted this resolution:

"Whereas the popular sentiment of all the citizens is opposed to mixed schools; and whereas the appointment of colored pupils to this school, it is believed, has caused a large decrease in the number of white pupils attending the institute, thus lessening the power for good to the community: Resolved, that hereafter only reputable white pupils will be admitted to the schools." In 1896, one of the members of the City Council appointed Clark, a colored boy,
32 to a scholarship, and he was refused admittance in 1896 and 1897, and the Court of Appeals sustained that action.

Applying the rule announced by Judge Du Relle, and the doctrine of the Maryland case, Berea College would have the right by by-law or regulation, to exclude all except the youth of one race, and therefore the government of the state may, by law, require the students to be confined to one race, or to enforce a separation of the races.

It has been said of this police power that it has been found impossible to frame, and that indeed it is deemed inadvisable to attempt to frame any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it can not extend, the courts considering it better to decide each case as it arises whether the police power extends thereto.

Blackstone says: "The police power is that which relates to the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations."

33 Chief Justice Redfield of Vermont in the case of Thorpe *vs.* Rutland etc. 62 A. D. 625, said:

"By the general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made."

The Illinois Court has said: "The police power of a state is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society."

Judge Bannin in his work on the Fourteenth Amendment says: "Police power in its broadest acceptance means the literal power of the government, to preserve and promote public welfare, even at the expense of private right."

The Court of Appeals of New York in the case of People *vs.* Budd, 15 A. S. R., 460, affirmed by the Supreme Court in 143 U. S. 517, said: "The very existence of government presupposes the
34 right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the Legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all." That court in the same case said further: "It (the police power) may be exercised so as to impair the value of property, or limit or restrict the use of property, yet in this there is no infringement of the constitutional guaranty, because that guaranty is not to be construed as liberating persons or property from the just control of the laws."

Judge Dillon says, 1 Munic. Corp. 212: "Every citizen holds his property subject to the proper exercise of this (police) power by the State Legislature. It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances."

35 This power in the state legislature has always been recognized and given full force by the Supreme Court of the United States. Lakeshore and M. S. R. Co. *vs.* Ohio etc., 43 U. S. 702. The Supreme Court in the case of Barbier *vs.* Connoly, 113 U. S., 27 says: "But neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people." In Boston Beer Co. *vs.* Massachusetts, 97 U. S., 25, the Supreme Court says: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus*
36 *populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may advise. That discretion can no more be bargained away than the power itself."

The police power in the state corresponds to the right of self defense in the individual, and when it comes to a question of protection from harm or injury from any source, the exercise of the police

power by the state is as much a duty and is as free from restrictions as is the exercise of the right of self defense by the individual. Self defense is everywhere recognized as the first law of nature.

The relative functions of the court and the legislature when called upon to consider questions of police power are well stated in the Jacobs case, 50 A. R., 636, as follows: "Generally it is for the legislature to determine what laws or regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property can not be arbitrarily invaded,
37 and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of the citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

The North Carolina court in State *vs.* Moore, 17 A. S. R., 696, says: "The question being whether the law making branch of the state government has exceeded the limits of its power, it is the duty of the court to resolve every doubt in favor of the validity of the law, and to presume that it was passed in good faith to remedy some evil not reached or corrected by previous legislation."

In State *vs.* Holden, 46 Pac. 1105, the Utah court said: "Though reasonable doubts may exist as to the power of the legislature
38 to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of government."

Judge Cooley says: "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It can not run a race of opinions upon the points of rights, reason and expediency with the law making power."

Judge Du Rell in his separate opinion in Ohio Valley Railway Rec. *vs.* Lander etc., 20 Ky. L. R. 913, said in discussing the separate coach law of this state: "The policy of such law, its ultimate purpose, or the reasons which led to its enactment are not matters for our consideration. Whether the law is a justifiable exercise of the police power does not depend upon these considerations. That a judge differs with the legislature upon a question of policy does not authorize him to say that a law passed in pursuance of such a policy is not a legitimate exercise of the police powers of the state. For example, a judge may disagree entirely with the reasons which induce a legislature to adopt a quarantine law. He may believe that the disorder, whose spread is thereby sought to be prevented, is not

infectious or contagious. Such belief, however, would not justify
him in holding that the law was not within the police power
39 of the government. And so with regard to the laws with re-
gard to the suppression of lotteries. Illustrations might be multiplied." Judge Du Relle here has very clearly defined the function of the courts when called upon to determine the validity of acts of the legislature passed in pursuance of the police power of the state.

The Supreme Court in Missouri Pac. R. Co. *vs.* Humes, 115 U. S., 512, says: "It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from the state legislatures."

The same court in Sinking Fund Cases, 99 U. S., 718, says: "Every possible presumption is in favor of the validity of a statute, and this continued until the contrary is shown beyond a reasonable doubt. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

"It is only when a law amounts to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful
40 business that it must be declared unconstitutional." State *vs.* Chicago etc. Rwy. Co., 64 A. S. R., 482.

This question of the separation of the races, in some of its phases has been rather frequently before the courts, and those cases acquaint us with the general policy of the law on the question.

Judge Bannin in his work on the Fourteenth Amendment when referring to laws based upon racial differences says: "Such legislation if the state regards it best for the harmony and comfort of the two races, and conducive to public order, would seem to find full warrant under the police power."

The Supreme Court in Plessy *vs.* Ferguson, 163 U. S., 256, one of the separate coach cases, says: "Laws permitting and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislature in the exer-
41 cise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

Chief Justice Shaw of Massachusetts in the case of Roberts *vs.* Boston, 5 Cush. 198, said: "Conceding, therefore, in the fullest manner, that colored persons, descendants of Africans, are entitled by law to equal rights, constitutional and political, civil and social, the question then arises whether the regulation in question, which provides separate schools for colored persons, is a violation of any of these rights. * * * It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep rooted prejudice in public opinion. This

prejudice, if it exists, is not created by law. Whether this distinction and prejudice, existing in the opinions and feelings of the community, would not as effectually be fostered by compelling colored and white children to associate together may well be
42 doubted.

At all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence; and we can not say that their decision upon it is not founded on just grounds of reason and experience, and is the result of a discriminating and honest judgment."

In an opinion of the Supreme Court of Pennsylvania in the case of the Phil. & Westchester R. R. Co. *vs.* Miles, 93 A. D. 744, is found the fullest and strongest statement of the reasons which justify a separation of the races.

That court says: "The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this state, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white we do not
43 know, but the fact is apparent and the races are distinct, each producing its own kind and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures. The tendency of intimate social mixture is amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse and but another to intermar-
44 riage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other freedman; that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but no less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as reasonably practicable, but in a

spirit of kindness and charity and with due regard to equality of rights, it is not prejudice *not* caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator Himself, and not to compel them to intermix contrary to their instincts."

No well informed person in any section of the country will now deny that the position of the Southern people that "segregation in school, church and society is in the interest of racial integrity,
45 and racial progress," is sound and who will deny that that is a laudable desideratum.

Such have been from the earliest history of our country the views of our most profound scholars and wisest philosophers. History tells us that Thomas Jefferson was one of the first advocates of emancipation of the slaves, and that as early as 1778 he drew, offered and had passed in Virginia a bill prohibiting the importation of slaves by land or sea and proclaiming those so imported to be free. In another bill he providid for the emancipation of all after-born slaves, but while he was giving this unmistakable evidence of his abhorrence of slavery, it is said that he unreservedly expressed his disbelief that the two races could mingle in harmony under co-equal conditions of freedom. In 1821 when commenting upon and bewailing the failure of his state to adopt his schemes for emancipation he wrote the following:

"It was found that the public mind would not yet bear the proposition, nor will it bear it even at this day. Yet the day is not distant when it must bear and adopt it, or worse will follow. Nothing is more certainly written in the book of fate than that these
46 people are to be free. Nor is it less certain that the two races can not live in the same government. Nature, habit, opinion, have drawn indelible lines of distinction between them."

In the light of the fulfillment of the portion of this prophecy which the last generation witnessed, and with the race problem still unsolved, can the present generation, until the books of the negro problem in America are finally balanced, say with absolute certainty, that the other part of this great philosopher's prophecy was not forecasted with an equal prescience?

Applying the rules of law set out in this opinion—rules that have been announced by the highest authority and approved by so many courts—to the legislation now under consideration, the court is unable to reach any conclusion other than that the act in question comes clearly within the province of the law making power of the state, and that the court would be unwarranted in holding that the action of the Legislature was not a legitimate exercise of the police power of the state.

The defendant's demurrer to the indictment will therefore
47 be overruled and the defendant will be given an exception.

If this case reaches the higher courts and the views expressed in the opinion are sustained and upheld, it is the personal view of the judge of this court, that the act of the Legislature which is now so vigorously assailed by the defendant will prove to be a blessing to Berea College, and to the colored as well as to the white

youth of Kentucky. Instead of the usefulness of Berea College being hampered, it is the opinion of the judge of this court that its power for good will be greatly extended and enlarged. If it should be determined by the trustees of the College, as the judge of this court hopes and believes it will be, to continue the college at Berea for the reception and education of white boys and girls, and to establish at some other point in Kentucky, beyond the prohibited distance, a college for the reception and education of colored youth, the prejudice which has heretofore existed to some extent in some quarters and from some persons against Berea College, because of the co-education there of the two races, will completely vanish, and
48 the generous open-handed people of Kentucky will extend their sympathy to, and give substantial aid and encouragement to both institutions to an extent *to* which many Kentuckians have heretofore been unwilling to do. These views, of course, do not affect the legal questions involved in this case, but they cause the judge of this court to be better satisfied with the conclusions reached as to the legal aspects of the case, than he could be, did he not believe that beneficent results will surely follow a cheerful compliance with and acquiescence in the Day Bill by the defendant.

This court does not believe that the Legislature of Kentucky was prompted by any race prejudice or any hostility towards the negro in passing the act under consideration. Kentucky is not inimical to the education of her colored citizens. The state not only pays annually as much per head for the education of each colored boy and girl between the ages of six and twenty years, as it does for each white boy and girl between those ages, but it maintains for the higher education of the colored race, a colored normal school at Frankfort, and in that school those who will agree to teach in the colored common schools a period equal to twice the time spent in the
49 normal school are given free tuition. Annual appropriations of $5,000,000, and more are made from the funds of the state to support this school, and in 1902 there was a special appropriation of $15,000.00 made to erect new buildings.

While the legislature is thus constantly evincing a spirit of sympathy with, and giving substantial aid for the education of the colored youth of the state, it should not be said that that body was prompted by other than the purest and best motives in the enactment of this Day Bill.

Order Signing for Trial.

Ordered that this case be, and is, assigned to the 14th day of the present term for trial.

February Term, 21st Day of February, 1905.

6009.

COMMONWEALTH OF KENTUCKY
vs.
BEREA COLLEGE.

Jury, Verdict, and Judgment.

The defendant pleaded "not guilty" and a jury, to wit: Anderson Lake, Tom Hendren, W. J. Wagers, Shelby Million, W. O. Anderson, H. H. Colyer, John Duncan, Oscar Helton, Allen Douglas, F. M. Gibson, George H. Myers and John W. Ballard, were duly impannelled and sworn to try the issue joined. The indictment was read to the jury by the clerk and the jury, who after hearing the evidence and receiving instructions from the court, gave this verdict:

"We, the jury, find the defendant guilty and fix its fine at One Thousand Dollars.

H. H. COLYER, *Foreman.*

The defendant then offered a motion in arrest of judgment, on the ground that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court, which motion the court overruled, to which ruling of the court the defendant excepts.

Wherefore, it is adjudged that the plaintiff recover of the defendant the sum of One Thousand Dollars and her costs herein expended.

Order Filing Motion and Grounds for New Trial.

February Term, 22nd Day of February, 19—.

6009.

COMMONWEALTH
vs.
BEREA COLLEGE.

The defendant this day filed grounds herein in writing and thereupon moved the court to set aside the verdict and judgment rendered herein and grant it a new trial, and the court having considered thereof and being advised, it is ordered that said motion be and is overruled, to which ruling of the court the defendant excepts and prays an appeal to the Court of Appeals, which is granted.

Motion and Grounds for a New Trial.

Madison Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BEREA COLLEGE, Defendant.

Motion and Grounds for a New Trial.

Case No. 1.

The defendant moves the court to grant a new trial herein on the following grounds:

First. That the verdict of the jury is contrary to law.

Second. That the court erred in giving to the jury the instructions asked for by the Commonwealth.

Third. That the court erred in refusing to give instruction number one asked for by the defendant.

Fourth. That the court erred in refusing to give instruction number two asked for by the defendant.

Fifth. That the court erred in overruling the motion of
52 the defendant to arrest the judgment.

Order Noting Filing of Bill of Exceptions.

The defendant tendered a bill of exceptions herein, which was approved and signed by the court and ordered to be filed and made a part of the record without being spread upon the order book.

Bill of Exceptions.

Madison Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BEREA COLLEGE, Defendant.

Indictment: Operating a School for Whites and Negroes.

Be it remembered that on the calling of this case for trial in the Madison Circuit Court, the jury having been impanneled and sworn, the Commonwealth introduced as a witness A. BROCK, who testified as follows:

Direct examination by B. A. CRUTCHER:

Q. Mr. Brock, please state your name to the stenographer.
A. A. Brock is my name.

Q. Where do you reside Mr. Brock?
53 A. I live in Berea.
Q. In this county?
A. Yes, sir.
Q. Are you one of the teachers there, in this county?
A. Yes, sir, I teach there.
Q. Berea College: that is an incorporation?
A. I do not know.

The defendant at this point admitted by counsel that Berea College is a corporation organized and incorporated under the General Statutes of the State of Kentucky, and waived proof of same.

Q. Are you one of the professors in the school?
A. I have charge of the Night School Department only.
Q. At any time previous to the 8th day of October, 1904, was the college open for the reception of students?
A. During the summer, after the spring term had closed, during the summer I had charge of a night school and, as well as I remember, on the 13th, the forenoon of the 13th of September,
54 1904, they presented to me students; that is, one white student and one colored student, and directed me to teach them, and I did so.
Q. Was that in the college building, in Berea in this county?
A. Yes, sir.
Q. They were being taught in the same school?
A. Yes, sir.
Q. At the same time?
A. Yes, sir.
Q. And the same instruction?
A. Yes, sir.
Q. That was under the auspices of the college?
A. Yes, sir.
Q. Maintained and operated by Berea College?
A. Yes, sir.
Q. You are a professor in the college?
A. I do teaching work; that is, I have never received any degree that would entitle me to be called a professor.
Q. You have received your pay from Berea College, a school and institution of learning in this county?
55 A. Yes, sir.
Q. And were acting under their direction at the time you taught the school?
A. Yes, sir.

This being all of the evidence introduced or offered by either party.

The Commonwealth moved the court to give the jury the following instructions:

1. If the jury believe from the evidence beyond a reasonable doubt that the defendant, Berea College, being a corporation and owning, maintaining and operating a college, school or institution of learning known as Berea College, located in the town of Berea in

Madison County, Kentucky, did in Madison County, Kentucky, after the 15th day of July, 1904, and before the 8th day of October, 1904, unlawfully and wilfully, that is, intentionally, permit and receive both the white and negro races as pupils for instruction in said college, school and institution of learning, the jury
56 should find the defendant guilty and fix its punishment at a fine of one thousand dollars.

2. Unless the defendant has been proved guilty beyond a reasonable doubt, the jury should find the defendant not guilty.

To the giving of which instructions, the defendant objected, but the court overruled the objection and gave said instructions to the jury, to which ruling the defendant excepted and still excepts.

The defendant moved the court to give the jury the following instructions:

1. That the Act of the General Assembly of the Commonwealth of Kentucky entitled, "An Act to prohibit white and colored persons from attending the same school," under which the indictment herein was found, is in conflict with the Bill of Rights and the Constitution of the Commonwealth of Kentucky, and is null and void; and the jury is instructed to find the defendant not guilty, to the giving of which instruction the Commonwealth objected, and the court sustained the objection and refused to give said instruction to the jury, to which ruling the defendant excepted and still excepts.

57 The defendant also moved the court to give the jury the following instruction:

2. That the Act of the General Assembly of the Commonwealth of Kentucky entitled, "An Act to prohibit white and colored persons from attending the same school" under which the indictment herein was found, violates the provisions of the Fourteenth Amendment to the Constitution of the United States, and is null and void, and the jury is instructed to find a verdict of not guilty; to the giving of which instruction the Commonwealth objected and the court sustained the objection and refused to give such instruction to the jury, to which ruling of the court the defendant excepted and still excepts.

The foregoing being all the instructions asked by either party and all given or refused by the court, the case was submitted to the jury, who returned the following verdict:

We, the jury, find the defendant guilty and fix its fine at one thousand dollars.

H. H. COLYER, *Foreman.*

Whereupon the defendant moved the court to arrest the judgment, on the following ground; *i. e.*, that the facts stated
58 in the indictment do not constitute a public offense within the jurisdiction of the court, which motion was overruled by the court, to which ruling the defendant excepted and still excepts.

Thereupon, the court entered the following judgment:

Wherefore it is adjudged that the plaintiff recover of the de-

fendant the sum of one thousand dollars and her costs herein expended; to which the defendant excepted and still excepts.

Afterwards, to-wit: on the 22nd day of February, 1905, the defendant filed a motion and the following grounds for a new trial, to-wit:

First. That the verdict of the jury is contrary to law.

Second. That the court erred in giving to the jury the instructions asked for by the Commonwealth.

Third. That the court erred in refusing to give instruction number one asked for by the defendant.

Fourth. That the court erred in refusing to give instruction number two asked for by the defendant.

Fifth. That the court erred in overruling the motion of
59 the defendant to arrest the judgment.

The court overruled said motion of defendant for a new trial, to which ruling of the court the defendant excepted and still excepts; and now prays that this its bill of exceptions be signed, sealed and enrolled and made part of the record, which is done.

And the said defendant prays an appeal to the Court of Appeals of Kentucky, which is granted.

J. M. BENTON, *Judge.*

CLERK'S OFFICE, *March 6th*, 1905.

Order Noting Execution of Supersedeas Bond.

6009.

COMMONWEALTH OF KENTUCKY
vs.
BEREA COLLEGE.

The defendant, Berea College, with S. S. Parks as surety, this day executed supersedeas bond to the Court of Appeals.

Supersedeas Bond.

6009.

BEREA COLLEGE, Appellant,
against
COMMONWEALTH, Appellee.

Upon an Appeal from a Judgment of the Madison Circuit Court, Rendered 21st day of Feby., 1905.

60 Whereas, said appellant, Berea College, an appeal from the judgment of the Madison Circuit Court, rendered at its February Term, 1905, against it in favor of the Appellee, for the sum of One Thousand Dollars, and the costs herein expended, and the appel-

lant desires to supersede the whole the said judgment above mentioned:

Now, we, Berea College with S. S. Parkes, surety, do hereby covenant to and with the appellee, The Commonwealth of Kentucky, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the whole judgment above stated, in case it shall be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior court, not exceeding in amount of value the whole judgment aforesaid. *(And also pay all rents, hire or damage, which, during the pendency of the appeal, may accrue on any part of the property of which the appellee is kept out of possession, by reason of the appeal.)

Witness our hands, this 6 day of Mch., 1905.

BEREA COLLEGE,
By T. J. OSBORNE, *Treasurer,*
S. S. PARKES.

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61 *This part of the bond may be omitted, except when real estate is in controversy in the suit.

62 STATE OF KENTUCKY, *Madison Circuit Court, set:*

I, Roy C. White, Clerk of the Madison Circuit Court, do certify that the foregoing is a true copy of the record of the Commonwealth of Kentucky *vs.* Berea College, No. 6009, as ful as the same remains of record and on file in my said office.

Witness my hand, this the 15 day of March, 1905.

ROY C. WHITE, *C. M. C. C.*

63 Be it remembered that on the 10th day of April, 1905, at a Court of Appeals held at the Capitol at Frankfort the following order was entered, to-wit:

BEREA COLLEGE
v.
COMMONWEALTH.

Madison.

SAME
v.
SAME.

Madison.

Came the parties by counsel and on motion said cases are ordered set for oral argument on May 19th, 1905, and afterwards on the 27th day of April, 1905, at a Court of Appeals held at the Capitol at Frankfort the following order was entered to-wit:

BEREA COLLEGE
v.
COMMONWEALTH.

Madison.

SAME
v.
SAME.

Madison.

Came appellants in the foregoing cases by counsel and filed an agreement, and on motion it is ordered that the order setting the cases for oral argument on May 19th be set aside and said cases are ordered continued for argument to the September term, and appellant is given until July 1st to file brief, and appellee is given until cases are set on the docket to file brief.

64 And afterwards on the 24th day of October, 1905, at a Court of Appeals held at the Capitol at Frankfort the following order was entered.

BEREA COLLEGE
v.
COMMONWEALTH.

2 Cases. Madison.

Came parties by counsel and on Motion said cases are ordered continued and set for oral argument on January 9th & 10th.

And afterwards on the 10th day of January 1906, at a Court of Appeals held at the Capitol at Frankfort the following order was entered to-wit:

BEREA COLLEGE.
v.
COMMONWEALTH.

2 Cases. Madison.

Came parties by counsel and on motion these cases are continued for oral argument and set for Feb. 2, 1906.

And afterwards on the 2nd day of February, 1906, at a Court of Appeals held at the Capitol at Frankfort the following order was entered, to-wit:

BEREA COLLEGE
v.
COMMONWEALTH.

2 Cases. Madison.

These cases coming on for hearing were argued by John G. Carlisle, C. F. Burnam and Guy Mallon for the appellant and N. B. Hays, Attorney General for the Appellee and submitted.

And afterwards on the 12th day of June, 1906 at a Court of Appeals held at the capitol at Frankfort the following Judg-
65 ment was entered,

6009.

BEREA COLLEGE, Appellant,
v.
COMMONWEALTH, Appellee.

Appeal from Madison Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said Judgment be affirmed, and that appellee recover of appellant ten per cent. damages on amount of the judgment superseded herein, which is ordered certified to said court. (Whole Court sitting except Judge Cantrill. Judge Barker dissenting.)

It is further considered that the appellee recover of the appellant its costs herein expended.

And on said day the following opinion was delivered:

66 Court of Appeals of Kentucky.

June 12, 1906. (To be Reported.)

BEREA COLLEGE, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Madison Circuit Court.

Opinion of the Court by Judge O'Rear.

There were two indictments against appellant in the Madison Circuit Court, for alleged infractions of an act of the Legislature, approved March 22, 1904, entitled "An Act to Prohibit White and Colored Persons from Attending the Same School." The first indictment which was numbered 6009 on the circuit court calendar,

charged appellant with operating a school for whites and negroes in violation of the act. The second indictment, numbered 6045, charges appellant with the offense of "maintaining and operating a college, school and institution of learning where persons of the white and negro races are both received, and within a distance of twenty-five miles of each other, as pupils for instruction."

67 The act alluded to, the title to which has been given above, is in the following words:—

"SECTION 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined $1000., and any person or corporation who may be convicted of violating the provisions of this act shall be fined $100. for each day they may operate said school, college or institution after such conviction.

"SECTION 2. That any instructor who shall teach in any school, college or institution where members of said two races are received as pupils for instruction shall be guilty of operating and maintaining same and fined as provided in the first section hereof.

"SECTION 3. It shall be unlawful for any white person to

68 attend any school or institution where negroes are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined $50. for each day he attends such institution or school: provided, that the provisions of this law shall not apply to any penal institution or house of reform.

"SECTION 4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color.

"SECTION 5. This act shall not take effect, or be in operation before, the 15th day of July, 1904." (Acts 1904, Ch. 85, page 181.)

Appellant was found guilty and *found* $1000. in each case. These appeals involve the constitutionality of the statute. The cases are heard and disposed of together.

69 Appellant Berea College is a private non-sectarian school. It was founded some fifty years ago, for the purpose, it is said, of "promoting the cause of Christ" and to give general and non-sectarian religious instruction to "all youth of good moral character." With a large endowment, extensive buildings and grounds and educational paraphernalia, it had for nearly fifty years before the act in question maintained a school at Berea, in Madison county, this State, presumably upon substantially the same basis as it was doing when the statute was enacted, and the indictments in these cases returned.

The circuit court sustained the constitutionality of the act in

every particular. Appellant assails its constitutionality upon the ground that it violates the Bill of Rights embraced in the Constitution of this State, as well as that it is in conflict with the Fourteenth Amendment to the Constitution of the United States.

It is claimed that the act is repugnant to the Bill of Rights in that it violates the following, which are guaranties to every citizen:—

1. The right of enjoying and defending their liberty.

2. The right of worshipping Almighty God according to
70 the dictates of their own consciences.

3. The right of seeking and pursuing their safety and happiness.

4. The right of freely communicating their thoughts and opinions.

5. The right of acquiring and protecting property.

6. That every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

The 26th section of the Bill of Rights concludes:—

"To guard against transgression of the high powers which we have delegated, we declare that everything in this bill of rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this constitution, shall be void."

Appellant's contention is:—

71 "This act violates the letter or spirit of every one of the provisions referred to. It destroys the rights of the teachers and pupils of Berea College to enjoy their liberties and the right of seeking and pursuing their safety and happiness. It denies the right to worship God according to the dictates of their own consciences by attending and participating in non-sectarian religious exercises in a school or institution of their own choice. It denies to the trustees, the teachers and all others connected with the institution the right to freely communicate their thoughts and opinions, and it denies to the institution itself and to its assistants and employees of every grade the right of acquiring and protecting property and the right to follow their usual and innocent occupations."

We understand appellant's argument to reach to the conclusion that the exercise of police power by the State is prohibited concerning the subjects enumerated in the bill of rights, at least
72 it is beneath those rights, and must be exercised so as not to conflict with them.

No jurist has dared to attempt to state the limit in law of that quality in government which is exercised through what is termed the police power. All agree that it would be inadvisable to attempt it. Yet very broadly and indefinitely speaking, it is the power and obligation of government to secure and promote the general welfare, comfort and convenience of the citizens, as well as the public peace, the public health, the public morals, and the public safety. (Cooley's Const. Limitations, 704; Tiedeman's Limitations of Police Power, 212; 1 Hare's American Constitutional Law, 766.) It is not inaptly regarded in some of its most important features as the right of self-protection in government, the right of self-preserva-

tion in society. It inheres in every State, is fundamental in the existence of every independent government, enabling it to conserve the well being of society and prohibit all things hurtful to its comfort, or inimical to its existence. In view of these definitions of the principle, unsatisfactory as they must be conceded to be, it is apparent that even those things reserved by the people in the bill of rights from the powers delegated to their magistrates are impliedly subject also to this power to preserve the State. It has always
73 been so regarded, except wherein its exercise in a particular manner or of a particular thing is expressly excluded, or necessarily so by the language used. It would be more tedious than difficult to enumerate instances. But some of those most readily occurring to the mind which are held subject to this power, are, that life and liberty either or both may be forfeited by the citizen under laws enacted under it. The right of worshipping Almighty God according to the dictates of our own consciences—probably the first great moving cause of our early colonial civilization—yields to the proper exercise of this power. For example, the practices of polygamy, so inimical to the well being of society, though deemed a religious rite, must yield to the police power of the State. If it were held here by some, as it is in some countries, a religious duty that mothers should worship God by sacrificing their babes, throwing them into the rivers to appease His supposed wrath, it would not be tolerated by the State, however conscientious the votary of the right. The pursuit of happiness in any useful and innocent employment, or the free movement of one's person, even when done under considerations of his own safety, are subject to this same power.
74 The most familiar instance probably is the application of quarantine and health laws. Yet this power itself fortunately has its limitations. To be exercised exclusively within the discretion of the political branch of government, it must have a just and real relation to one of the ends for which that power may be lawfully employed. Mere declaration that the proposed exercise is in behalf of such end is not enough. The action must be cognate to one of the subjects to which the power properly pertains. The duty is upon the courts upon a proper application, to declare void an attempted exercise of such power, which is not fairly and reasonably related to a proper end. Thus balanced, there is little danger that oppression can result from its arbitrary employment. The good sense and the honest judgment of each generation must after all furnish the real limit to the police power of government. For each age must judge, and will judge, of what is hurtful to its welfare, of what endangers the existence of society, of what threatens to destroy the race of people who are applying this primal law of self protection to their own case.

Because of its undefined extent, of its overpowering quality, of its unmeasurable value, of the great danger of oppression under
75 its guise, and of its abuse by those intolerant of the restraints of law, any new application of the police power of government is regarded with closest scrutiny, not unmixed with apprehension.

It can be abused, to the hurt of the people. It can be neglected to the hurt of the State.

The application of it by the statute above quoted, is new. It has never before been so applied so far as we are certainly aware. The question is, is it a fair exercise of the police power to prohibit the teaching of the white and negro races together? Is it a fair exercise of the power to restrain the two races from voluntarily associating together in a private school, to acquire a scholastic education?

The mingling of the blood of the white and negro races by interbreeding is deemd by the political department of our State government as being hurtful to the welfare of society. Marriage by members of the one race with those of the other is prohibited by statute. (Sections 2097, 2098, 2111, 2141, Ky. Statutes.) It is admitted freely in argument that the subject of marriage is one of the very first importance to society; that it may be regulated by law even as among members of the same race. Inbreeding is
76 known to lower the mental and physical vigor of the offspring. So incestuous marriages are prohibited. Others not incestuous, but involving the probable effect upon the vitality of the offspring are prohibited also, as marriages by idiots. Still other inhibitions, such as age, and so forth, are imposed, all of which look to the well being of the future generations. No one questions the validity of such statutes, enacted as they confessedly are under the police power of the State. Upon the same considerations this same power has been exercised to prohibit the intermarriage of the two races. The result of such marriage would be to destroy the purity of blood and identity of each. It would detract from whatever characteristic force pertained to either. Such statutes have been upheld in the following cases:

Ex parte Hobbs, 1 Woods, 537;
State *v.* Gibson, 36 Ind. 402;
State *v.* Jackson, 80 Mo. 177;
State *v.* Hairston, 63 N. C. 453;
Brook *v.* Brook, 9 H. L. 193;
Green *v.* State, 58 Ala. 190; 29 Am. Rep. 742;
Lonas *v.* State, 3 Heisk (Tenn.) 309.

77 Another exercise of the police power with respect to the separation of the two races which has been upheld, is the requiring them to use separate coaches in traveling upon railroads, as adopted by certain of the States. These statutes, and regulations of a similar kind even without statute, have been upheld wherever their validity has been questioned. The opinions in the following cases show the unanimity of holding and reasoning on this subject:

West Chester & Phil. R. R. Co. *v.* Mills, 55 Pennsylvania State, 209; 93 Am. Dec. 747; Smith *v.* State, 100 Tenn. 494; L. N. O. & T. R. R. Co. *v.* Mississippi, 133 U. S. 587; Plessy *v.* Ferguson, 163 U. S. 537; C. & O. Ry. Co. *v.* Kentucky, 179 U. S. 392.

We have such statute in Kentucky: section 795 Ky. Statutes. The validity of this statute has been upheld by this Court in L. &

N. R. R. Co. *v.* Commonwealth, 99 Ky. 663; Quinn *v.* L. & N. R. R. Co., 98 Ky. 231; Wood *v.* L. & N. R. R. Co., 19 R. 924; 101 Ky. 703; Ohio Valley R. R. Co. *v.* Lander, 104 Ky. 431; C. & O. Ry. Co. *v.* Commonwealth, 21 Rep. 228.)

78 In the provisions for public education made by the government of the United States for the District of Columbia, and by many of the States, a separation of the races is enforced by requiring separate schools to be provided for each, and prohibiting members of either race from attending the school provided for the other. In every instance in which the question has arisen as to the validity of such legislation it has been upheld as a valid exercise of its police power by the State.

Sections 16 & 17, Ch. 156 U. S. Statutes at Large;
Section 187 Constitution of Kentucky;
Section 4428 Ky. Statutes;
Lehew *v.* Brummell, 103 No. 551;
Corey *v.* Carter, 48 Ind. 362;
Martin *v.* Board of Education, 42 W. Va. 515;
State of Ohio *v.* McCann, 21 Ohio, 210;
Cisco *v.* School Board, 161 N. Y. 598;
Bertonneau *v.* Board of Directors, 3 Woods, 180.

Distinguished counsel for appellant while conceding the correctness of the application of the principle being discussed to
79 public schools and common carriers, seek to distinguish that application from the one contended for by the State in the case at bar upon the ground that in the cases of common schools and railroad travel the State was merely preventing an enforced association by the two races, whereas under the statute now being considered the power is attempted to be extended so as to prevent the voluntary association by the two races.

We cannot agree that the ground of distinction noted could form a proper demarkation between the point where the power might be exercised, and the one where it might not be. The thing aimed at by all this legislation was not that of volition. It was not until recently that attendance upon common or public schools was compulsory. It has nearly always been voluntary. All this legislation was aimed at something deeper and more important than the matter of choice. Indeed if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was at all a permissible subject for the exercise of the police power.

The separation of the human family into races, distinguished no less by color than by temperament and other qualities
80 is as certain as anything in nature. Those of us who believe that all of this was divinely ordered have no doubt that there was wisdom in the provision, albeit we are unable to say with assurance why it is so. Those who see in it only Nature's work must also concede that in this order, as in all others in nature, there is an unerring justification. There exists in each race a homogenesis by which it will perpetually reproduce itself, if unadulterated. Its

instinct is gregarious. As a check there is another, an antipathy to other races—which some call race prejudice. This is nature's guard to prevent amalgamation of the races. A disregard of this antipathy to the point of mating between the races is unnatural, and begets a resentment in the normal mind. It is incompatible to the continued being of the races, and is repugnant to their instincts. So much mating is universally regarded with disfavor. In the lower animals this quality may be more effective in the preservation of distinct breeds. But among men conventional decrees in the form of governmental prescripts are resorted to in aid of right conduct to preserve the purity of blood. No higher welfare of society can be thought of than the preservation of
81 the best qualities of manhood of all its races. If then it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross-breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breech of the main desideratum—the purity of racial blood. In less civilized society the stronger would probably annihilate the weaker race. Humane civilization is endeavoring to fulfill nature's edicts as to the preservation of race identity in a different way. Instead of one exterminating the other, it is attempted to so regulate their necessary intercourse as to preserve each in its integrity.

The maxims of liberty and the pursuit of happiness which are familiar to the common law, wherefrom the idea found in our bill of rights is probably borrowed, are the principles worked out by the Anglo-Saxon race for its own government. In no other country has it ever been attempted before, at least on so important a scale, to apply such principles alike to so many different races, types and creeds of men. The experiment is great in its importance. It forms now one of the biggest questions being worked out by this great North American republic. That much bitterness
82 has appeared, and some oppression has been practiced, are among the inevitable attendants upon the adjustment by people of different races of the rights justly belonging to each. Clashing of antipathies resulting in outbreaks of violence, tends to disturb the public peace; threatens the public safety, and so disrupts the serenity of common purpose to promote the welfare of all the people, that the question is become one of the first importance to the section where the two races live in the greatest numbers. That it is well within the police power of government to legislate upon this question so as to repress such outbreaks and to prevent disturbances of the public tranquil-ty, we have no sort of doubt. The seriousness of the situation is not new. Even before the abolition of slavery it was keenly and intelligently anticipated. Since the emancipation of the negro it has been not the least of the grave problems of government which have been presented to some of the States for solution. As the outcome of discussion, of agitation, of too-frequent conflicts, of violent turbulence that set even the law at defiance in some localities and in times of great

popular excitement, this species of legislation has been evolved
83 as tending to a solution of the trouble by removing as far as possible its cause. Is not this situation one, if ever there was one, which calls for and amply justifies the exercise of police power of government? Or should this irritating cause be left without restraint or control, till by the exhaustion of one side or the other it is settled by the sheer force of superiority of numbers or physical power? It is idle to talk of controlling ideas by legislation, or even by force. You cannot bind an idea by a statute. The attempt should be made, and we believe is being made, in good faith to so control this situation through the law that neither race can have just cause for complaint; so that each may have every lawful privilege and right that the other has; so that equality of rights before the law shall be a fact as well as a high-sounding theory; yet so as to conserve the very best of the characteristics of each race, to develop its ideals of morality, its thrift, independence and usefulness. Observation and study at close hand of both the theory and practical working of this problem of social existence, of the colaboration of two races so different as the white and black in the same State upon a plane of legal equality, where the government is by the people for the people, it has been found, so the
84 legislative department declares as evinced by the public policy indicated by the statutes discussed in this opinion, that at the very bottom of all the trouble is the racial antipathy to the destruction of its own identity; and that if that danger is removed, the friction practically disappears. A separation of the races under certain conditions is therefore enforced, where it is believed that their mingling would tend to produce the very condition which is found to lie at the base of the trouble. In its application it becomes all the more necessary that the overmastering principles included in the police power of government be firmly recognized, so that a clashing of race prejudices, or race destruction may be lawfully averted.

Counsel resort to conjecture concerning other legislation of this character which they fear might follow that now involved. It is suggested that the State might attempt to regulate, under the same power, the right of the races to work together in the same fields or factories, or to mingle together at all. A sufficient present answer to this is that each proposed application of the power is to be determined upon the circumstances under which it is sought to
85 be applied. If it is arbitrary, unreasonable or oppressive, it will be denied. Nor is it a legitimate argument to prove a negation of power by showing wherein it may be abused. If it be conceded, as we think the fact is, that the ultimate object of this legislation providing separate schools for the two races was to separate the youth of each during the most impressible and least responsible period of their lives, and until ripened judgment and observation can have set them well in the safe ways of thinking much of the dangers of the shame and distress which errors of immaturity might entail would be avoided. The legislation above enumerated is all of a kind. It has two great objects—one,

the preservation of the identity and purity of the races; the other, the avoidance of clashes between the races by preventing their most fruitful sources.

In upholding this character of legislation in a separate coach regulation the Supreme Court of Pennsylvania, in West Chester etc. R. R. Co. *v.* Miles, 93 Am. Dec. 747, thus stated the principal thought:—

"The danger to the peace engendered by the feeling of aversion between individuals of the different races can not be denied. It is the fact with which the company must deal. If a negro takes
86 his seat besides a white man or his wife or daughter, the law can not repress the anger or conquer the feeling of aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it.

"It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterwards, the breach of the peace it may have caused. * * *

"The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this State, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feel-
87 ings which he always imparts to his creatures when he intends that they shall not overstep the natural boundaries he has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is
88 not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repul-

sive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

Appellant's counsel construe this opinion as supporting their theory that the power being discussed may be exercised only where it forbids the enforced association of the races. While such
89 enforced association is more easily distinguished as falling within the power, yet the main idea is that such association at all under certain conditions leads to the main evil, which is, amalgamation of the races, and incidentally to conflicts between their members naturally engendered by too close personal conduct under conditions which are bound to excite prejudices and race animosities. If such evil falls within the police power to prevent, then whatever naturally contributes to them, may also be regulated, provided the regulation is itself reasonable. The act in question is within the legitimate exercise of the police power of the State, provided it is not so unreasonable in its provisions as to be oppressive and obnoxious to the limitations of the power. It is argued for appellant that the act quoted makes it a misdemeanor to teach white and negro pupils in the same institution anywhere in the State, (but for the proviso contained in the fourth section of the act) although there might not be a mingling of the races at all. This would be out of harmony with the spirit of the law. It would be an unreasonable and unwarranted interference indeed with the citizen's right to teach, and the pupils to be taught. Under the
90 rule in the construction of a statute to resolve any ambiguity in its language in favor of that meaning which is not repugnant to the Constitution, if the language admits of more than one construction, we have no doubt that the intention of this act was to prevent the two races from attending the same school at the same place and the same time whereby there would result an intermingling or close personal association between them. Such is the fair, reasonable meaning of the whole act, including title and context.

Section 4 of the statute makes it a misdemeanor not only to teach pupils of the two races in branches of the same institution, even though one race exclusively is taught in one branch, and the other in another branch, provided the two branches are within twenty-five miles of each other. This section is added as a proviso to the previous sections. Without this section as we construe the act, the teaching of the two races in the same school at the same time and place, is prohibited. But, if the same school taught the different races at different times, though at the same place, or at different places at the same time, it would not be unlawful. It evi-
91 dently was thought that the effect of the statute might be nullified by teaching the two races in the same school at the same time and place in fact, but perhaps in different rooms of the same building, or in different buildings of the same college plant,

constituting to all intents one building. A teaching in different rooms of the same building, or in different buildings so near to each other as to be practically one, would violate the statute. As it was such intimate personal association of the pupils that was being prohibited, it was attempted by the fourth section to make this impossible by prohibiting such teaching in branches of the same school if done within twenty-five miles of each other. This last section we think violates the limitations upon the police power: it is unreasonable and oppressive. We must look to the object of the legislation as well as to the words of the statute to devine the true meaning. It is not to prevent either race from being taught by an institution which also teaches the other. Nor is it to prevent persons from one race from teaching persons of the other, or employing their means for that purpose. The State itself teaches both races, but in separate schools. They are both taught within twenty-five miles of
92 each other, and within very short distances of each other. But this section can be ignored and the remainder of the act is complete notwithstanding.

The remaining question is whether the act as construed by this Court violates the Fourteenth Amendment to the Constitution of the United States. That amendment guarantees the equal protection of the laws to all citizens of the United States, and prohibits any State from depriving any citizen of the United States of his property, life or liberty without due process of law.

The act involved applies equally to all citizens. It makes no discrimination against those of either race.

The right to teach white and negro children in a private school at the same time and place is not a property right. Besides, appellant as a corporation created by this State has no natural right to teach at all. Its right to teach is such as the State sees fit to give to it. The State may withhold it altogether, or qualify it. (Allgeyer *v.* Louisiana, 165 U. S. 578.) We do not think the act is in conflict with the Federal Constitution.

93 Wherefore, we conclude that the judgment in case 6009 should be *affirmed;* and that the judgment in case 6045 should be *reversed,* and be remanded with directions to dismiss that indictment.

The whole Court sitting, except Cantrill, J. absent. Judge Barker dissents, except in case 6045.

N. B. HAYS,
Att'y Gen'l.
CHAS. H. MORRIS,
For Appellee.

JOHN G. CARLISLE,
C. F. BURNAM,
GUY WARD MALLON,
For Appellant.

94 Be it remembered that on the 21st day of June, 1906 the following order was filed in the office of the Clerk of the Court of Appeals, to-wit:

Court of Appeals of Kentucky.

BEREA COLLEGE
v.
COMMONWEALTH OF KENTUCKY.

Time until the 1st day of next September term of the court is given to counsel for appellant to file a petition for rehearing of this cause heretofore docketed as No. —.

W. E. SETTLE,
Judge Court of Appeals.

95 Be it remembered that on the 25th day of October 1906 at a Court of Appeals held at the Capitol at Frankfort the following order was entered to-wit:

BEREA COLLEGE
vs.
COMMONWEALTH.

Madison.

Come appellant by counsel and filed grounds, and moved the court to grant a rehearing herein, and for a re-argument of said case, and further moved the court for an extension of thirty days to file a bond herein, on a writ of error to the Supreme Court of the United States, which motions are submitted. (The grounds named in the foregoing order are as follows:)

96 No. 1.

BEREA COLLEGE
vs.
COMMONWEALTH OF KY.

The appellants move the court for a rehearing of this cause, and as grounds therefor refer to the brief filed herein by Messrs. Carlisle and Mallon, and especially upon the unconstitutionality of the Kentucky Statute, on which the indictment and trial and judgment rendered by the Madison Circuit Court was based.

With all due respect to this Honorable Court, they think the opinion rendered sustaining in part the validity of that Statute upon Police Power of the State is erroneous, and should be reviewed.

CARLISLE, BURNAM & MALLON.

97 Be it remembered that on the 25th day of Oct. 1906, the appellant filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors, and which is in words and figures as follows:

BEREA COLLEGE
vs.
COMMONWEALTH OF KY.

Assignment of Errors.

The appellant assigns the following errors:
1st. The Court erred in the opinion rendered in not adjudicating that the Kentucky Statute under which the indictment was found and the trial and conviction were *had* to be unconstitutional.
2nd. In not adjudging that said Statute was violative of the 14th Amendment of the Constitution of the United States, and the Bill of Rights of the Kentucky State Constitution.
3rd. It was error not to reverse the judgment of the Circuit Court and grant a new trial.
98 4th. The court should on the reversal have ordered the Indictment to be dismissed and the appellant discharged from all liability from the fine of $1444 and costs.

CARLISLE, MALLON & BURNAM,
For Appellant.

99 Be it remembered that on the 22nd day of November 1906 at a Court of Appeals, held at the Capitol at Frankfort, the following order was entered, and which is in words and figures as follows:

BEREA COLLEGE
v.
COMMONWEALTH.

Madison.

The court being sufficiently advised it is considered that appellant's motion for a rehearing be and the same is hereby overruled: and it is further considered that the appellant be given 20 days from this date to execute a Writ of Error bond on an appeal to the Supreme Court of the United States.

100 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, set:

I, J. Morgan Chinn, Clerk of the Court of Appeals of Kentucky certify that the foregoing is a correct copy of the transcript of the record, including the judgment and opinion of the court in the case of

BEREA COLLEGE, Appellant,
v.
THE COMMONWEALTH OF KENTUCKY, Appellee,

Appeal from Madison Circuit Court.

as the same appears from the records of my office.

In testimony whereof I hereunto set my hand and caused my official seal to be hereunto affixed. Done at the Capitol at Frankfort this the 26th day of November, A. D. 1906.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk Court of Appeals of Kentucky.

101 Be it remembered that on the 7th day of December 1906, there was filed in the office of the Clerk of the Court of Appeals of Kentucky, a petition for Writ of Error, and which is hereto attached, and is as follows—

102 Kentucky Court of Appeals.

BEREA COLLEGE, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Court of Appeals in rendering judgment against it in the above entitled case, the Appellant prays a writ of error from said decision and judgment to the Supreme Court of the United States. Assignment of errors herewith.

C. F. BURNAM,
Attorney for Appellant.

STATE OF KENTUCKY, *Court of Appeals, ss:*

The writ of error is allowed upon the execution of a bond by the Berea College to the Commonwealth of Kentucky, in the sum of two thousand dollars said bond when approved to act as a supersedeas. Dated Decr. 3 1906.

J. P. HOBSON,
Chief Justice of the Kentucky Court of Appeals.

[Endorsed:] Filed Dec. 7 1906 J. Morgan Chinn, C. Ct.

103 And on daid date there was filed in the office of the Clerk of the Court of Appeals, the Original Writ of Error, and order allowing same, and which is hereto attached, and is as follows—

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Court of Appeals of Kentucky:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said Court of Appeals of Kentucky, before you, at the June sitting of the April term, 1906, therof, between Berea College, Appellant, *Versus* Commonwealth of

Kentucky, Appellee, a manifest error has happened, to the great damage of the said Appellant, and plaintiff in error, Berea College, as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this December 7th, 1906

Done in the City of Frankfort, with the seal of the Circuit Court of the United States for the District of Kentucky attached.

[6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk Circuit Court United States, Dist. of Kentucky.

Allowed,
J. P. HOBSON,
Chief Justice Kentucky Court of Appeals.

[Endorsed:] Filed Dec. 7, 1906. J. Morgan Chinn, C. Ct.

105 And on said date there was filed in the office of the Clerk of the Court of Appeals of Ky. the original Citation, with proof of summons endorsed thereon, and which is hereto attached. and is as follows:

106 THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of appeals of Kentucky, wherein The Berea College is Plaintiff in error and you are Defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Court of Appeals of Kentucky, this 7th day of Dec'r, 1906.

J. P. HOBSON,
Chief Justice, Kentucky Court of Appeals.

Attest:
J. MORGAN CHINN,
Clerk, Kentucky Court of Appeals.

FRANKFORT, KENTUCKY, *Dec'r.* 7, 190–.

I Attorney General, and as attorney of record for the Commonwealth of Kentucky in the above entitled case, hereby acknowledge the service of the above citation.

N. B. HAYS,
Attorney Gen.

Filed Dec. 7, 1906.

J. MORGAN CHINN, *C. Ct.*

107 And on said date there was filed in the office of the Clerk of the Court of Appeals, a writ of Error bond, and which is in words and figures as follows to-wit:

108 Supreme Court of the United States.

BEREA COLLEGE, Appellant and Defendant in Error,
vs.
COMMONWEALTH OF KENTUCKY, Appellee and Plaintiff in Error.

Bond.

Know all men by these presents, that we, The Berea College as principal and The National Surety Co., as sureties, are held and firmly bound unto the Commonwealth of Kentucky in the sum of Two Thousand Dollars, to be paid to the said Commonwealth of Kentucky, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 7th day of Dec., 1906.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Kentucky Court of Appeals.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

BEREA COLLEGE,
By F. J. OSBORNE,
Treasurer.

Approved by
J. P. HOBSON,
Chief Justice Ky. Court of Appeals.

THE NATIONAL SURETY CO.,
[SEAL.] By D. D. SMITH,
Resident Secretary.

109 And afterwards on the 20th day of December, A. D. 1906, there was filed in the office of the Clerk of the Court of Appeals of Kentucky, an additional assignment of Errors, and which is in words and figures as follows, to-wit—

BEREA COLLEGE, Plaintiff in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

And now comes Berea College, the plaintiff in error herein by its attorneys J. G. Carlisle, Guy Ward Mallon, and C. F. Burnam, and says there are manifest errors in the judgment rendered by the Court of Appeals of the Commonwealth of Kentucky, on the 12th day of June, 1906, in this, towit—

1. The said Court erred in sustaining the action of the Circuit Court of Madison County in overruling the demurrer to the indictment.

2. The said Court erred in sustaining the action of said Circuit Court in the first instruction to the jury, asked for by the Commonwealth.

3. The Court erred in sustaining the action of the said Circuit court in refusing to give to the jury the several instructions asked for by the defendant.

4. The said Court erred in sustaining the action of the said Circuit Court in overruling the motion to arrest the judgment.

5. The said Court erred in sustaining the action of said Circuit Court in overruling the motion for a new trial.

6. The said Court erred in deciding that the statute under which the indictment was found, did not violate any of the provisions of the Fourteenth Amendment to the Constitution of the United States.

7. The said Court erred in deciding that said Statute did not deprive plaintiff in error of its property and property *and property* rights without due process of law.

110 8. The said Court erred in deciding that said Statute did not abridge the priveleges and immunities of citizens of the United States.

9. The said Court erred in deciding that the said Statute, did not deny to the plaintiff in error, and its teachers and pupils, the equal protection of the law.

10. The said court erred in refusing to reverse the judgment of the Madison Circuit Court.

Wherefore, the plaintiff in error prays, that said judgment and decision be reversed.

J. G. CARLISLE.
C. F. BURNAM.
GUY W. MALLON.

111 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, Set.:

In obedience to the commands of the within Writ of Error, I herewith transmit to the Supreme Court of the United States, a duly

certified transcript of the complete record, and proceedings in the case named in said Writ of Error, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office.

Done at the Capitol at Frankfort, this the 20th day of December, A. D. 1906.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk, Court of Appeals of Kentucky.

Endorsed on cover: File No. 20,511. Kentucky, court of appeals. Term No. 546. Berea College, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed January 7th, 1907. File No. 20,511.

JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. ~~180~~ 12

BEREA COLLEGE

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

J. G. CARLISLE,
GUY WARD MALLON,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 190.

BEREA COLLEGE

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR PLAINTIFF IN ERROR.

The indictment in this case charges Berea College with the offense of "maintaining and operating a school for whites and negroes," which is alleged to have been committed as follows:

> "The said Berea College, being a corporation duly "incorporated under the laws of the State of Ken- "tucky and owning, maintaining and operating a col- "lege, school and institution of learning known as "'Berea College,' located in the town of Berea, Mad- "ison County, Kentucky, did unlawfully and wilfully "permit and receive both the white and negro races "as pupils for instruction in said college, school and "institution of learning."

There was a demurrer to the indictment, which was overruled by the court, and exceptions taken, and on the trial the

court gave the following instruction to the jury, to which the plaintiff in error objected and excepted:

> "If the jury believe from the evidence beyond a "reasonable doubt that the defendant, Berea College, "being a corporation and owning, maintaining and "operating a college, school or institution of learning "known as Berea College, located in the town of "Berea, in Madison County, Kentucky, did, in Mad-"ison County, Kentucky, after the 15th day of July, "1904, and before the 8th day of October, 1904, un-"lawfully and wilfully, that is, intentionally, permit "and receive both the white and negro races as pupils "for instruction in said college, school and institu-"tion of learning, the jury should find the defendant "guilty and fix its punishment at a fine of one thou-"sand dollars."

The plaintiff in error asked the court to give the following instructions, to which the Commonwealth objected, and the objections were sustained and both of the instructions were refused, to which the plaintiff in error excepted:

> "1. That the act of the General Assembly of the "Commonwealth of Kentucky entitled 'An act to "prohibit white and colored persons from attending "the same school,' under which the indictment "herein was found, is in conflict with the Bill of "Rights and the Constitution of the Commonwealth "of Kentucky, and is null and void; and the jury is "instructed to find the defendant not guilty.
>
> "2. That the act of the General Assembly of the "Commonwealth of Kentucky entitled 'An act to "prohibit white and colored persons from attending "the same school,' under which the indictment "herein was found, violates the provisions of the "Fourteenth Amendment to the Constitution of the "United States, and is null and void, and the jury "is instructed to find a verdict of not guilty."

The jury found the plaintiff in error guilty, and the court imposed a fine of $1,000. An appeal was taken to the Court

of Appeals of the State, and on the 12th day of June, 1906, that court affirmed the judgment. (See Opinion, R., 27-37.)

The indictment was found under an act approved on the 22d of March, 1904, entitled "An act to prohibit white and colored persons from attending the same school," which reads as follows:

> "SECTION 1. That it shall be unlawful for any "person, corporation or association of persons to "maintain or operate any college, school or institu- "tion where persons of the white and negro races are "both received as pupils for instruction, and any "person or corporation who shall operate or main- "tain any such college, school or institution shall "be fined $1,000, and any person or corporation who "may be convicted of violating the provisions of this "act shall be fined $100 for each day they may oper- "ate said school, college or institution after such con- "viction.
>
> "SECTION 2. That any instructor who shall teach "in any school, college or institution, where mem- "bers of said two races are received as pupils for in- "struction shall be guilty of operating and maintain- "ing same, and fined as provided in the first section "hereof.
>
> "SECTION 3. It shall be unlawful for any white "person to attend any school or institution where "negroes are received as pupils or receive instruction, "and it shall be unlawful for any negro or colored "person to attend any school or institution where "white persons are received as pupils or receive in- "struction. Any person so offending shall be fined "$50 for each day he attends such institution or "school: *Provided*, That the provisions of this law "shall not apply to any penal institution or house of "reform.
>
> "SECTION 4. Nothing in this act shall be con- "strued to prevent any private school, college or in- "stitution of learning from maintaining a separate "and distinct branch thereof in a different locality, "not less than twenty-five miles distant, for the edu- "cation exclusively of one race or color.

"SECTION 5. This act shall not take effect or be
"in operation before the 15th day of July, 1904."
Acts, 1904, ch. 85, p. 181.

As the court below decided all the questions arising under the Constitution of the State, the only question here is whether or not the act in question is a violation of the Fourteenth Amendment to the Constitution of the United States. There is no controversy about the facts, and if there was, this court would not review them. It was shown that in the forenoon of September 13, 1904, one white pupil and one colored pupil were presented to a teacher at the college, and he gave them instruction together (R., 22). It is not improper to say that this was done for the purpose of making the strongest possible case in favor of the Commonwealth and securing a decision for the guidance of the college in the future. The indictment did not charge that both races had been instructed together, nor does the statute make that fact material. It was sufficient to constitute the offense that if any person, corporation, or association of persons maintained or operated any college, school, or institution of learning *where* persons of the white and negro races are both received as pupils for instruction. In construing this part of the act, the court below said:

> "It evidently was thought that the effect of the
> "statute might be nullified by teaching the two races
> "in the same school at the time and place, in fact,
> "but perhaps in different rooms of the same build-
> "ing, or in different buildings of the same college
> "plant, constituting to all intents one building. A
> "teaching in different rooms of the same building,
> "or in different buildings so near to each other as to
> "be practically one, would violate the statute" (R., 36, 37).

The Fourteenth Amendment to the Constitution of the United States provides:

> "No State shall make or enforce any law which
> "shall abridge the privileges or immunities of citi-

"zens of the United States; nor shall any State de-
"prive any person of life, liberty or property without
"due process of law; nor deny to any person within
"its jurisdiction the equal protection of the law."

Our contention is that a legislative enactment depriving a person of the right to pursue his usual occupation or depriving a person of the right to attend a school or institution of learning of his own choice is not due process of law, and if the person is a citizen of the United States such an enactment abridges his privileges and immunities as such.

Berea College was incorporated under the laws of the State of Kentucky, in July, 1859, for the purpose of "promoting the cause of Christ," when the institution of slavery still existed in the State, and amendments to the charter were adopted in April, 1897, and July, 1899 (see Appendix), and it has maintained its school continuously from its first organization until this legislation took effect. It has invested large sums of money in the purchase of land, the erection of necessary buildings, providing furniture, books, etc., for the use of its pupils. It has received considerable sums as endowments, to be used only for the education of the two races, all of which would be lost if it is prevented from continuing to do so, and besides the value of a large part of its property will be destroyed or greatly impaired if this act is enforced. The act in question declares its occupation unlawful and imposes penalties upon the institution for continuing it. Not only is the institution declared guilty of crime if it receives as pupils for instruction persons of the white and colored races, but the teachers are declared guilty of crime if they teach in the institution, and all pupils, white or colored, are declared guilty of crime if they attend.

It will be observed that the statute does not merely prohibit the teaching of the two races together, or from teaching them in the same room, or from giving instruction from the same teachers, but is intended to prevent the same

person, association, etc., from receiving both races for instruction, no matter where or by whom they may be taught, if they are taught at the same place.

The act cannot be separated into several parts and held to be partly constitutional and partly unconstitutional; it relates to but one subject and has only one purpose, which, as just stated, is to prohibit the same person, or the same corporation, or the same association of persons from receiving pupils of the two races for instruction; and in order to acomplish this purpose penalties are imposed, not only upon the offending person, association, or corporation, but also upon all persons who teach for the institution, although they may teach the two races separately, and upon all pupils who attend such schools, although the two races may be taught separately by different teachers and in different rooms.

In view of this it follows that the constitutionality of each and every provision of the act, all being intended to accomplish one purpose and all having a direct bearing on the rights and interests of the plaintiff in error, must be inquired into by the court, and if any one of them is unconstitutional, the entire act is invalid.

There are two classes of cases in which a party has a right to rely upon the unconstitutionality of a statute. First, where his rights are injuriously affected by the unconstitutional provision contained in the statute; and, second, where the unconstitutional provision would not of itself directly affect his rights, but is so connected with the constitutional provisions which do affect them that it invalidates the entire act. As to the first of these propositions there can be no room for controversy, while as to the second its correctness has been repeatedly recognized by the courts. It would be tedious to cite all the cases on this point, but we call the attention of the court to two of them decided by the Supreme Court of the United States.

In *Field vs. Clark*, 143 U. S., 649, and the cases reported

with it, the question argued and decided by the court was whether the so-called reciprocity clause of the act of March 3, 1883, which related solely to the duties on sugars, molasses, tea, and hides, was or was not constitutional. The parties who instituted the actions had no interest whatever in the duties imposed upon any one of those articles, but they claimed that the alleged unconstitutional clause invalidated the whole act, and that therefore they were entitled to recover back the duties paid by them on woolen goods, silks, and cotton. The court took jurisdiction of the constitutional question, but decided that the clause assailed was not invalid.

The other case is *Pollock vs. Farmers' Loan & Trust Company*, 158 U. S., 601 (the Income Tax cases), where it was held that several long sections of the statute, in which the complaining parties had no interest whatever, were unconstitutional and void *in toto*, because they contained, among many other things, provisions imposing a tax on incomes derived from personal property and real estate.

In the case at bar the rights of the plaintiff in error are directly and injuriously affected, not only by the first section of the act, which we claim is clearly unconstitutional, but by the second and third sections, which prohibit all persons from teaching at its school and prohibit all persons from attending it, its purpose being to prohibit the same person, corporation, or association of persons from teaching pupils of both races at the same place, even though they may be taught separately. The provisions of the act which impose penalties upon the teachers and pupils are parts of the means employed to accomplish that one purpose.

If the act had imposed no penalty whatever upon the persons, corporations, or associations for operating or maintaining the school, but had subjected all teachers and pupils to fines, as is done in the second and third sections, it is evident that the effect upon the institution would be just the same as it is now; that is, its business would be de-

stroyed and the value of its property would be greatly impaired, for, without teachers and pupils, it would be forced to abandon the work for which it was organized. It is plain that the college is directly interested in resisting the enforcement of the act as a whole, and the enforcement of any part of it, and therefore has a right to rely in this proceeding upon the unconstitutionality of all, or any one, of its provisions. Even if the interests of the institution were not directly and injuriously affected by the sections of the act imposing penalties upon the teachers and pupils, the statute, as already stated, is an entirety, and all its provisions are intended to effect a single purpose; so that if any material part of it is unconstitutional, the whole is void. There are many cases in which part of a statute may be declared unconstitutional, while other parts are held to be valid; but they are all cases in which the parts are clearly separable and may well stand alone; and, besides, they are not cases in which the enforcement of the unconstitutional parts would affect the complaining party just as much as the enforcement of the constitutional parts. In no case will the constitutional part of an act be enforced when other parts are unconstitutional, unless the court can assume that the legislature would have passed the act if the void part had been omitted.

The simple act of operating and maintaining the school constitutes the offense charged in the indictment, and it was not necessary or proper under the statute to make any further charge. In order, therefore, to sustain the validity of this legislation as a proper exercise of the police power, the court must know judicially, outside of the statute and outside of the indictment, that the operation and maintenance of such a school are detrimental to the public peace, health, or safety, or it must concede that the legislative judgment upon that subject is conclusive. Is there any fact judicially known to the court which would authorize it to decide that such schools or institutions are so detrimental

in any of these respects that the legislature has authority to suppress them by the imposition of fines and penalties upon the proprietors, teachers, and students? That both races shall be educated is the settled policy of the State, and that they are taught in schools maintained by public taxation in the same towns, villages, and districts throughout the State is a public fact of which the court will take judicial notice.

The legislature is not the final judge of the extent of its own power; for if it were, constitutional limitations would be useless. But, in the present instance, the legislature has, in the very statute before the court, recorded its judgment that the coeducation of the two races at the same place and in the same building, and by the same teachers, is not contrary to a sound public policy, nor in and of itself detrimental in any way to the health or morals of the teachers or pupils or injurious to the health, morals, or peace of the community at large. By a proviso in the third section of this act it is expressly provided that its provisions shall not apply to any penal institution or house of reform. This, of course, includes all public penal institutions and all houses of reform, whether conducted by the public authorities or by private individuals or associations, and completely removes the only ground upon which this statute could possibly be supported as a valid enactment under the police power.

The difference between the extent of legislative power over schools and other institutions established and maintained by the State and its power over private schools and institutions is obvious. In the case of public schools the legislature may regulate the hours of teaching, prescribe the text-books, the qualifications of teachers, the ages at which pupils shall be admitted, classify the students who shall be instructed together, and in fact do almost anything which does not make unjust or unconstitutional discriminations among the people who contribute by taxation to the funds used in defraying the expenses of the system. But

a private school stands upon exactly the same footing as any other private business, and the power of the State to prohibit it, or to interfere with the right to teach in it, or to attend it, is no greater than its power to prohibit any other ordinary occupation of the people. The statute is unnecessary and unreasonable, and therefore an arbitrary interference with the rights of the people in the conduct of their private business and in the pursuit of their ordinary occupations. The right to maintain a private school is no more subject to legislative control than the right to conduct a store, or a farm, or any other one of the various occupations in which the people are engaged. Could the legislature impose a penalty upon a merchant, or a farmer, or a manufacturer for employing persons of the white and colored races to work together in the same room or field? These questions seem almost absurd; and yet the answer to them must decide this case, unless it can be shown that the legal and constitutional rights of those who engage in the business of conducting private schools or teaching in such schools are not entitled to the same measure of protection as the rights of citizens engaged in other pursuits. The right of the citizen to choose and follow an innocent occupation is both a personal and a property right (*Cummings vs. Missouri*, 4 Wall., 321).

Speaking of the right to make contracts, this court said in *Allgeyer vs. Louisiana*, 165 U. S., on page 591:

> "To deprive the citizen of such a right as herein
> "described without due process of law is illegal.
> "Such a statute as this in question is not due process
> "of law, because it prohibits an act which, under the
> "Federal Constitution, the defendants had a right
> "to perform. This does not interfere in any way
> "with the acknowledged right of the State to enact
> "such legislation in the legitimate exercise of its
> "police or other powers as it may deem proper. In
> "the exercise of such a right, however, care must be
> "taken not to infringe upon those other rights of the
> "citizen which are protected by the Federal Constitu-
> "tion."

In the recent case of *Schnair vs. Navarro Hotel Imp. Co.*, reported in 182 N. Y., 83, the statute involved declared it unlawful for a copartnership in the city of New York to engage in or carry on the business, trade, or calling of employing or master plumber unless the name and address of such persons and of each and every member of said copartnership shall have been registered, etc.

In deciding the case the court said:

> "The right to follow any lawful pursuit is one of "the inalienable rights of a citizen of the United "States. * * * There is no more sacred right "of citizenship than the right to pursue unmolested "a lawful employment in a lawful manner. It is "nothing more or less than the sacred right of labor. "All laws therefore which impair or trammel these "rights, which limit one in his choice of a trade or "profession, or confine him to work or live in a "special locality, or exclude him from his home or "restrain his otherwise lawful movements, are in"fringements upon his fundamental rights of lib"erty which are under constitutional protection. "The common business and callings of life, the ordi"nary trades and pursuits which are innocent in "themselves and have been followed in all countries "from time immemorial, must therefore be free in "this country alike upon the same terms. The lib"erty of pursuit, the right to follow any of the ordi"nary callings of life, is one of the privileges of a "citizen of the United States."

In support of these propositions the court cited:

Butchers' Union Co. vs. Crescent City Co., 111 U. S., 746.

Yick Wo vs. Hopkins, 118 U. S., 356.

Slaughter-house case, 16 Wall., 36.

Colon vs. Lisk, 153 N. Y., 188.

People vs. Gibson, 101 N. Y., 389.

People vs. Marx, 99 N. Y., 377.

In re Jacobs, 98 N. Y., 98.

Lochner vs. State of New York, 198 U. S., 45.

Mr. Justice Washington, in the case of *Corfield vs. Coryell*, Washington C. C., 371, in defining what were the privileges and liberties of citizens of the several States, said:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature FUNDAMENTAL; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which comprise this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the Government; * * * the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole."

This was quoted and approved by this court in the case of *Maxwell vs. Dow*, 176 U. S., 588-589.

Speaking of the restraints which legislatures may constitutionally impose upon the people for the general good, the court said, in the case of *Munger vs. Kansas*, 123 U. S., 661:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking Fund cases*, 99 U. S., 700, 718), the courts must obey the Constitution rather than the law-making department of the Government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury vs. Madison*, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if

> "'these limits may, at any time, be passed by those "'intended to be restrained? The distinction be- "'tween a government with limited and unlimited "'powers is abolished if those limits do not confine "'the persons upon whom they are imposed, and if "'acts prohibited and acts allowed are of equal obli- "'gation.' The courts are not bound by mere forms, "nor are they to be misled by mere pretenses. They "are at liberty—indeed, are under a solemn duty— "to look at the substance of things, whenever they "enter upon the inquiry whether the legislature has "transcended the limits of its authority. If, there- "fore, a statute purporting to have been enacted to "protect the public health, the public morals or the "public safety, has no real or substantial relation to "those objects, or is a palpable invasion of rights se- "cured by the fundamental law, it is the duty of the "courts to so adjudge, and thereby give effect to the "Constitution."

The nature or extent of legislative power cannot be affected by calling it the "police power." Absolute arbitrary power over the lives, liberties, and property of the people cannot exist in this country, under any name or in any form, and it is always the duty of the courts to disregard mere names and forms in determining whether the legislature has or has not exceeded its authority. It is for the court to decide, not only whether the subject to which legislation relates is within the scope of the power attempted to be exercised, but also whether the legislation itself is in violation of the personal or property rights of the citizen. The subject to which the legislation relates may be clearly within the scope of the police power, and yet the enactment may be so unreasonable, unnecessary, or inappropriate for the accomplishment of the purpose ostensibly designed, that the courts, in the discharge of their duty to protect personal and property rights, will be bound to hold it null and void. The Supreme Court of Illinois has very clearly stated the functions of the legislature and the courts in relation to this subject.

In *Ritchie vs. People*, 155 Ill., 98-110; *Eden vs. People*, 165 Ill., 296-318, the court said:

> "The police power of the State is that power which enables it to promote the health, comfort, safety and welfare of society. It is very broad, but it is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the Constitution and must have some relation to the ends sought to be accomplished, that is to say, to the comfort, welfare or safety of society.
>
> "Where the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end.
>
> "It cannot invade the rights of persons and property under the guise of a mere police regulation when it is not such in fact; and where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the protection of the comfort, safety and welfare of society." (*Ritchie vs. People*, 155 Ill., 98-100; *Eden vs. People*, 161 Ill., 296-318).

Up to the time of the passage of the statute under which these indictments were found, the business conducted by the appellant was as lawful as any other business carried on in the State; and it is not claimed by anyone that its affairs had not been at all times conducted in a peaceable and orderly manner. Nor is it claimed that its managers, teachers, or pupils have not been at all times quiet and law-abiding members of the community; or that their teachings or example have in fact been in any way injurious to the public morals or the general welfare. No immoral or seditious instruction has been given, either inside or outside of the school, by any one connected with it. It is not claimed that the doctrine of the social equality of the two races has been promulgated, or that social equality or amalgamation has in fact resulted in the locality where the college is located, or at any other place in the State. It is evident, how

ever, that the legislation complained of was prompted by the fear, notwithstanding the experience of nearly fifty years to the contrary, that social equality and amalgamation might be promoted and encouraged by the coeducation of the two races, for there is no other ground upon which an argument could be made in support of the statute.

While we do not claim that the act makes any discrimination between the two races in a legal or constitutional sense, it is plain that race prejudices, or at any rate racial differences, are factors which must be considered in determining how far the legislature, in the exercise of the so-called police power, can constitutionally go in controlling the voluntary personal intercourse of different races in the various walks of life; for it must be conceded that if the power now claimed is sustained, it cannot be judicially confined to such legislation as relates only to the white and colored races. In fact, if the legislature can separate the people into classes according to race or color for the purpose of prohibiting voluntary personal intercourse between them, there is no reason why it may not, for the same purpose, separate them into classes according to any other rule or test it may deem proper to adopt.

The Constitution makes no distinction between the different races or different classes of the people, and if a distinction is to be made, it must be done by the legislature in the exercise of the police power. All such legislation is necessarily injurious to the peace and prosperity of the people and its validity ought to be clearly established before it receives the sanction of the courts. It is common knowledge that the manufacture and sale of ardent spirits, gambling, the maintenance of nuisances, the keeping of disorderly houses, and many other vocations which are subject to regulation and control in the exercise of the police power, are in themselves injurious to the health, morals, and safety of the public; but even over these subjects the legislative authority

is limited to the enactment of reasonable and necessary laws; or, as was said in *Lawton vs. Steele*, 152 U. S., 133:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In re Jacobs, 98 N. Y., 115, the court said:

> "When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the court must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adequate to that end. That we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void."

In *Bertholf vs. O'Reilly*, 74 N. Y., 515, it was expressly held that one may be deprived of his liberty in a constitutional sense without putting his person in confinement, and that one of the constitutional rights of the citizen is his right to exercise his faculties, and to follow a lawful occupation for the support of himself and his family; and in the case of Jacobs, cited above, the court said:

> "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived; and hence any law which destroys it or its value, or takes away of its

"essential attributes, deprives the owner of his prop-
"erty.

"The constitutional guaranty would be of little
"worth, if the legislature could, without compensa-
"tion, destroy property or its value, deprive the
"owner of its use, deny him the right to live in his
"own house or to work any lawful trade therein.
"If the legislature has the power under the Consti-
"tution to prohibit the prosecution of one lawful
"trade in the tenement house, then it may prevent
"the prosecution of all trades therein. 'Ques-
"'tions of power,' says Chief Justice Marshall, in
"*Brown vs. State of Maryland* (12 Wheat., 419),
"'do not depend upon the degree to which it may be
"'exercised. If it may be exercised at all it must
"'be exercised at the will of those in whose hands it
"'is placed.' Blackstone in his classification of
"fundamental rights, says: 'The third absolute right
"'inherent in every Englishman is that of property,
"'which consists in the free use, enjoyment and
"'disposal of all his acquisitions without any control
"'or diminution, save only by the law of the land'
"(1 Com., 138). In *Pumpelly vs. Green Bay Co.*
"(13 Wall., 166, 177), Miller, J., says: 'There may
"'be such serious interruption to the common and
"'necessary use of property as will be equivalent
"'to a taking within the meaning of the Constitu-
"'tion.' In *Wynehamer vs. People* (13 N. Y., 378,
"398), Comstock, J., says: 'When a law annihilates
"'the value of property and strips it of its attributes,
"'by which alone it is distinguished as property,
"'the owner is deprived of it according to the plain-
"'est interpretation, and certainly within the con-
"'stitutional provision intended expressly to shield
"'personal rights from the exercise of arbitrary
"'power.' In *People vs. Otis* (90 N. Y., 48), An-
"drews, J., says: 'Depriving an owner of property
"'of one of its attributes is depriving him of his
"'property within the constitutional provision.'"

The Matter of the Application of Jacobs, 98 N. Y., 99.

See also Cooley on Const. Lim., § 393.

This court, in the case of *Butchers' Union vs. Crescent City Company*, 111 U. S., 756, says:

> "As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained.
>
> "These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident'—that is, so plain that their truth is recognized upon their mere statement—'that all men are endowed,' not by the edicts of emperors, or decrees of Parliament, or acts of Congress, but 'by their Creator with certain inalienable rights'—that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime—'and that among these are life, liberty, and the pursuit of happiness, and to secure these'—not grant, but secure them—'governments are instituted among men, deriving their just powers from the consent of the governed.'
>
> "Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the rights of others, which may increase their prosperity or develop their faculties so as to give them the highest enjoyment.
>
> "The common business and dealings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.

"It has been well said, that 'the property of any
"'man is his own labor, as it is the original founda-
"'tion of all other property, so it is the most sacred
"'and inviolable. The patrimony of the poor man
"'lies in the strength and dexterity of his own hands,
"'and to hinder his employing this strength and
"'dexterity in what manner he thinks proper without
"'injury to his neighbor, is a plain violation of this
"'most sacred property. It is a manifest encroach-
"'ment upon the just liberty of the workman and of
"'those who might be disposed to employ him. As
"'it hinders the one from working at what he thinks
"'proper, so it hinders the others from employing
"'whom they think proper.'"

Adam Smith's Wealth of Nations, Bk. 1, chapter 10.

Again:

In a late case upon this subject, *Lochner vs. People of State of New York*, decided in April, 1905, and reported in 198 U. S., 45, the court said:

"There are, however, certain powers, existing in
"the sovereignty of each State in the Union, some-
"what vaguely termed police powers, the exact de-
"scription and limitation of which have not been
"attempted by the courts. Those powers, broadly
"stated and without, at present, any attempt at a
"more specific limitation, relate to the safety, health,
"morals and general welfare of the public. Both
"property and liberty are held on such reasonable
"conditions as may be imposed by the governing
"power of the State in the exercise of those powers,
"and with such conditions the Fourteenth Amend-
"ment was not designed to interfere.

Mugler vs. Kansas, 123 U. S., 123 U. S., 623.
In re Kemmler, 137 *id.*, 436.
Crowley vs. Christensen, 137 *id.*, 86.
In re Converse, 137 *id.*, 624.

"The State, therefore, has power to prevent the
"individual from making certain kinds of contracts,
"and in regard to them the Federal Constitution

"offers no protection. If the contract be one which "the State, in the legitimate exercise of its police "power, has the right to prohibit, it is not prevented "from prohibiting it by the Fourteenth Amendment. "Contracts in violation of a statute, either of the "Federal or State government, or a contract to let "one's property for immoral purposes, or to do any "other unlawful act, could obtain no protection from "the Federal Constitution, as coming under the lib- "erty of person or of free contract. Therefore, when "the State, by its legislature, in the assumed exercise "of its police powers, has passed an act which seri- "ously limits the right to labor or the right of con- "tract in regard to their means of livelihood between "persons who are *sui juris* (both employer and em- "ployee), it becomes of great importance to deter- "mine which shall prevail—the right of the indi- "vidual to labor for such time as he may choose, or "the right of the State to prevent the individual "from laboring or from entering into any contract "to labor, beyond a certain time prescribed by the "State.

"This court has recognized the existence and up- "held the exercise of the police power of the States "in many cases which might fairly be considered "as border ones, and it has, in the course of its deter- "mination of questions regarding the asserted invalid- "ity of such statutes, on the ground of their viola- "tion of the rights secured by the Federal Constitu- "tion, been guided by rules of a very liberal nature, "the application of which has resulted, in numerous "instances, in upholding the validity of State stat- "utes thus assailed."

* * * * * * *

"It must, of course, be conceded that there is a "limit to the valid exercise of the police power by "the State. There is no dispute concerning this "general proposition. Otherwise the Fourteenth "Amendment would have no efficacy and the legisla- "tures of the States would have unbounded power, "and it would be enough to say that any piece of "legislation was enacted to conserve the morals, the "health or the safety of the people; such legislation

> "would be valid, no matter how absolutely without "foundation the claim might be. The claim of the "police power would be a mere pretext—become an- "other and delusive name for the supreme sover- "eignty of the State to be exercised free from con- "stitutional restraint. This is not contended for. "In every case that comes before this court, therefore, "where legislation of this character is concerned "and where the protection of the Federal Constitu- "tion is sought, the question necessarily arises: Is "this a fair, reasonable and appropriate exercise of "the police power of the State, or is it an unreason- "able, unnecessary and arbitrary interference with "the right of the individual to his personal liberty "or to enter into those contracts in relation to labor "which may seem to him appropriate or necessary "for the support of himself and his family?"

The personal and property rights recognized by the decisions of the courts in this country do not depend for their protection solely upon express or implicit constitutional guaranties. They were declared in the Great Charter nearly seven centuries ago in these memorable words:

> "No freeman shall be taken or imprisoned or be "disseized of his freehold or liberties, or free cus- "toms, or be outlawed or exiled, or any otherwise de- "stroyed; nor will we pass upon him nor condemn "him but by lawful judgment of his peers, or by the "law of the land."

The words "the law of the land" are said by Coke, in his Institutes, to be the equivalent of the words "due process of law," as found in 37 Edward 3, and incorporated into the Bill of Rights or Constitution of nearly all our States.

The words "law of the land" and "due process of law" mean much more in this country, where we have written constitutions with express and implied limitations upon legislative power, than they ever meant in England. We have no omnipotent legislative body in this country, and an act of the legislature not authorized by the Constitution has no

more validity than the judgment of a court rendered without affording the party who is to be affected by it an opportunity to be heard. An unconstitutional statute is not "the law of the land," and no matter how regular and formal the judicial proceedings may be for the enforcement of such a statute, they do not constitute "due process of law." It has been many times decided that the first ten amendments to the Constitution of the United States were limitations upon the power of the General Government, and not limitations upon the power of the several States; but the purpose of the Fourteenth Amendment was two-fold—first, to enforce the absolute equality of the two races before the law, so far as civil rights are concerned, and, second, to protect the civil rights of both races against encroachments by the State authorities.

While that amendment may not limit the subjects upon which the police power of a State may be exercised, so long as there is no discrimination on account of race or color, yet in the exercise of that power the State cannot disregard the limitations which the amendment imposes.

> "The recent amendments to the Constitution have "not changed nor diminished their (the States') "previously existing power to legislate respecting the "public health and public morals. But though this "power rests with them, it cannot be admitted that, "under the pretense of providing for the public "health or public morals, they can encroach upon "public rights which those amendments declare shall "not be impaired."
>
> *Ex parte Virginia*, 100 U. S., 339, page 347.

Mr. Justice Field said in *Bashier vs. Connolly*, 113 U. S., 27-31:

> "The Fourteenth Amendment, in declaring that "no State shall deprive any person of life, liberty or "property without due process of law, nor deny to "any person within its jurisdiction the equal pro- "tection of the laws, undoubtedly intended not only

"that there should be no arbitrary spoliation of prop-
"erty, but that equal protection and security should
"be given to all under like circumstances in the en-
"joyment of their personal and civil rights; that all
"persons should be equally entitled to pursue happi-
"ness and acquire and enjoy property; that they
"should have like access to the courts of the country
"for the protection of their persons and property,
"the prevention and redress of wrongs, and the en-
"forcement of contracts; that no impediment should
"be interposed to the pursuits of any one except as
"applied to the same pursuits by others under like
"circumstances; that no greater burdens should be
"laid upon them than are laid upon others in the
"same calling and condition."

There is no doubt that the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States were adopted for the protection of the colored race, or that their primary purpose was to establish absolute civil equality—that is, to place the colored race, in respect to civil rights, upon the same basis as the white race.

The Slaughter-house cases, 83 U. S., 36.
Strauder vs. West Virginia, 100 U. S., 303.
Virginia vs. Rives, 100 U. S., 313.
Bush vs. Kentucky, 107 U. S., 110.

But the effect of the Fourteenth Amendment, as has been repeatedly decided, is not only to secure equal civil rights to the colored race, but to protect the white race also in the unmolested enjoyment of all its rights of person and property.

In order to avail himself of the protection guaranteed by that amendment, it is not necessary for a party to show that the legislation complained of makes a discrimination against the white race, as such, or against the colored race, as such. It is sufficient if it can be shown that an attempt has been made to abridge the privileges or immunities of citizens of the United States, or to deprive persons of life, liberty or property without due process of law, or to deny to any person

within the jurisdiction of the State the equal protection of the law; and if the legislation attempts to do any of these things, and the complaining party is, or will be, injured by its enforcement, he has a right to contest its validity. It is well settled that the word "person" in the amendment includes corporations as well as individuals.

The cases in which it has been held competent for the legislature to provide for the separation of the two races by common carriers of passengers and in the common schools supported at the public expense have no bearing upon the questions involved in the case at bar. The legislature undoubtedly possesses a very large measure of control over all individuals and corporations engaged in public or quasi-public occupations, such as common carriers, innkeepers, proprietors of ferries, etc., and in the case of public schools its power to regulate them or abolish them cannot be questioned unless there are express constitutional provisions restricting its authority. There have been many statutes enacted requiring railroad companies to provide separate coaches for white and colored passengers, and in some instances making it a penal offense for a person of one race to ride in a coach set apart for the use of the other, and the validity of such acts has generally—perhaps always—been sustained by the courts. No statute, however, has ever been enacted requiring railroad companies to carry their white and colored passengers on different trains or in different cars wholly detached from each other, and we feel quite sure that if such legislation should be enacted it would not be sustained by this or any other court. Independently of the fact that these statutes all relate to common carriers engaged in a quasi-public service, there are other considerations which clearly distinguish them from the act now before the court. If separate accommodations are not provided on railways, it is not possible for persons of one race to use that method of conveyance without mingling with persons of the other race. There is therefore substantially an enforced

association of the two races, and such enforced association may very properly be prevented by legislation.

Colored persons may be prohibited from forcing themselves into the presence or society of white persons in a public conveyance contrary to their wishes, and a white person may be prohibited from compelling persons of the colored race to associate with them contrary to their wishes. So long as separate accommodations are not provided and maintained by law, the two races have equally the right to enter the same coach and remain there, no matter how objectionable the presence of one may be to the other. The reasons, therefore, for the enactment of separate coach laws and others of like character and effect are altogether different from any that can be suggested in support of the legislation involved in the case at bar.

Social equality between persons of the white and colored races, or between persons of the same race, cannot be enforced by legislation, nor can the voluntary association of persons of different races, or persons of the same race, be constitutionally prohibited by legislation unless it is shown to be immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify a direct interference with the personal liberty of the citizen; and even in such a case the restriction should go no further than is absolutely necessary.

This case involves many questions not presented or decided in any of the cases arising under statutes providing for the separation of the two races in public conveyances and public schools. The right of a person, corporation, or association of persons to maintain and operate a private school and to receive or reject such pupils as it may choose; the right of a teacher to accept employment in a private school and to follow a peaceable occupation for a support; the right of a pupil to attend a private school of his choice and to pursue his literary and religious studies in a peaceable and orderly manner—all those rights are not only infringed,

but totally destroyed by the act now in question, if it is a valid law.

These questions are much broader and more important than any that could possibly arise in cases where the court has only to decide whether a person, white or colored, shall be permitted to force his way into a particular car when another one just as comfortable has been provided for his use, or where it has to decide whether a person has a right to demand admission to a particular public school when other public schools of the same character have been established for his use.

But even if it were conceded that any legislative interference with the personal and property rights of the citizen could be justifiable in such a case as is presented here, the question would still remain whether the act is a reasonable and necessary exercise of power, or whether its provisions are unreasonable, unnecessary, and arbitrary. If any one of the statutes providing for the separation of the two races on railroads had declared that no railroad company should receive for transportation persons of the white and colored races, with a proviso, however, that they might be received and carried if the coaches in which they were separately accommodated were at all times kept entirely disconnected from each other, it is safe to say that every court in the country would have condemned it as a flagrant abuse of legislative authority. Yet such a provision in a separate coach law would have been fully as reasonable and necessary as in the act now before the court.

In *Plessy vs. Ferguson*, 163 U. S., 256, the leading separate-coach case, the validity of the statute was sustained, but Mr. Justice Harlan, in a vigorous opinion, dissented, and said:

> "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each."

And again:

> "If a State can prescribe as a rule of civil conduct
> "that whites and blacks shall not travel as passengers
> "in the same railroad coach, why may it not so
> "regulate the use of the streets of its cities and towns
> "as to compel white citizens to keep on one side of a
> "street and black citizens to keep on the other? Why
> "may it not, upon like grounds, punish whites and
> "blacks who ride together in street cars or in open
> "vehicles on a public road or street?
>
> "Why may it not require sheriffs to assign whites
> "to one side of a courtroom and blacks to the other?
> "And why may it not also prohibit the comming-
> "ling of the two races in the galleries of legislative
> "halls or in public assemblages convened for the con-
> "sideration of the political questions of the day?
> "Further, if this statute of Louisiana is consistent
> "with the personal liberty of citizens, why may not
> "the State require the separation in railroad coaches
> "of native and naturalized citizens of the United
> "States, or of Protestants and Roman Catholics?"

Although Mr. Justice Harlan stated extreme cases for the purpose of illustrating his argument in opposition to the act before the court, he did not assume that the decision of the majority could possibly establish a precedent for legislation requiring the separation of the two races in private schools or in private places of business of any kind. He spoke only of separation in public places, such as streets, public roads, street cars, courthouses, legislative halls, public assemblages, &c.; but the act now before the court makes a long stride in advance of any legislation that could have been reasonably expected to result from any judicial decision yet pronounced. The court, in the case cited, evidently did not believe that the consequences apprehended by the dissenting justice could follow from its decision, for it said in response:

> "The reply to all this is that every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the pro-

> motion of the public good and not for the annoyance or oppression of a particular class."

That education in private schools is not a matter of public or State control was directly decided in *Clarke vs. Maryland Institute*, 87 Md., 643. In that case a colored man claimed the right to have his son attend the institute, upon the ground that equal facilities for education must be provided for both races, and that this school was amenable to the rule of race equality because it received appropriations of public money from the city. The court held, however, that the mere receipt of aid from the city did not make the institution public, and, being still a private institution, it could do as it pleased in the selection of its pupils.

The court below cited and relied upon the cases of *Roberts vs. Boston*, 5 Cush., 198, and *Westchester and Phila. R. R. Co. vs. Miles*, 55 Pa. St., 209, but an examination of those cases will show that they have no bearing upon any legal or constitutional question presented on these appeals.

In the Massachusetts case Chief Justice Shaw simply decided that under the statute of that State the public-school authorities had plenary power "to arrange, classify and distribute pupils in such manner as they think best adapted to their general proficiency and welfare," and that they therefore had a right to designate and maintain separate public schools for the instruction of the two races. The legislature of Kentucky has done the same thing in regard to the public schools, and no one questions its power over that subject. In the Pennsylvania case the railroad company had itself provided for a separation of the two races on its cars, and the question was whether it had a right to do so. That case was decided in 1867, before the adoption of the Fourteenth Amendment, and the points decided, as stated in the syllabus, were:

> "1. No one can be excluded from a carriage on account of color, religious belief or political relations or prejudice.

"2. If there be no clear and reasonable difference to base separation of passengers upon, it cannot be justified by mere prejudice.

"3. The right of a carrier to separate passengers is founded on his right of private property in the means of conveyance and the public interest."

In the course of its opinion the court said:

"When, therefore, we declare a right to maintain separate relations, as far as reasonably practicable, but in a spirit of kindness and charity and with due regard to equality of rights, it is not prejudice nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to *compel them to intermix contrary to their instincts.*"

We respectfully submit that no sufficient reason can be shown for such legislative interference with the private business of the people as is attempted by the act under consideration; that even if the business of the appellant was constitutionally subject to legislative control, this statute is in the highest degree unreasonable and oppressive; that it imposes penalties for the commission of acts which are in themselves entirely innocent and harmless; and that it violates the fundamental principles of free government and is expressly inhibited by the Constitution of the United States and is null and void.

A reversal of the judgment is respectfully asked.

J. G. Carlisle,
Guy Ward Mallon,
Attorneys for Appellant.

The court below appeared to think the validity of this act might be sustained upon the ground that it was an amendment or repeal of the charter of the college, and referred to *Allgeyer vs. La.*, 165 U. S., 578 (R., 37). We do not see that the case cited has any bearing upon this question, as the trustees did not acquire the right to maintain the school by any grant from the State. That right constitutes no part of the franchise of this voluntary corporation. It is a right which belongs to every free citizen; the absolute repeal of the charter would not have prevented the trustees, as individuals, from continuing the school; the only franchise the association acquired by the charter was the right to be a corporate body and to conduct its business as such, and the only effect of a repeal would have been to dissolve the corporation, leaving the trustees and those associated with them entirely free to maintain and operate the school as it had been conducted for nearly half a century.

APPENDIX.

Original Articles of Incorporation.

CHAPTER II.

HISTORICAL DOCUMENTS.

I. ORIGINAL ARTICLES OF INCORPORATION.

(See Madison Co. Deed Book 15, page 204.)

In order to promote the cause of Christ, we, the undersigned, do voluntarily unite ourselves together to establish and maintain an institution of learning under the following Articles of Agreement:—

ARTICLE I.

This Institution shall be called Berea College.

ARTICLE II.

This College shall be under the care of a Board of Trustees, who shall receive and hold in trust all lands, legacies, moneys, and other property committed to them for said Institution, and exercise their trust in the use and disposal of the same in such manner as shall, in their judgment, promote the highest interests of said College.

ARTICLE III.

The Board of Trustees shall elect a President, Vice-President and Secretary of said Board from their own number.

ARTICLE IV.

It shall be the duty of the Board of Trustees to appoint the President and Teachers of the College, also a Secretary and Treasurer of the same, fix their salaries, prescribe the courses of study, confer degrees, receive and disburse moneys, make contracts and enforce the same, audit accounts, ap-

point examiners, and transact all other necessary business for the interests of the Institution.

Article V.

The Board of Trustees may make such By-laws as it may deem necessary to promote the interests of the Institution.

Article VI.

The Persons signing these Articles of Agreement shall constitute its original Board of Trustees, and new members may be added to said Board, or vacancies therein filled by the addition of such persons as shall be elected members thereof by the Board.

Article VII.

In case of the dissolution of this Institution all its funds, real estate and property shall be given to the American Missionary Association of New York City, to be applied under the direction of the Executive Committee of that Association to its charitable uses and purposes.

Article VIII.

This Constitution may be amended by a vote of three-fourths of the Trustees at any annual meeting, providing a written notice of amendment shall have been sent to each Trustee as much as three months previous to said meeting.

(Articles VII and VIII were added after the Civil War.)

Chapter III.

ARTICLES OF INCORPORATION.

Complying with Ky. Statutes, Chap. XXXII, Art. VIII, and Recorded in Madison County Deed Book 47, page 619, June 10, 1899.

Whereas, in the year 1859, Berea College, an institution of learning, was organized by written articles, afterwards entered on record in the office of Clerk of the Madison

County Court in the State of Kentucky, which institution has existed until the present day; and,

Whereas, it is deemed best to conform the Institution, in its organization, to the present laws and constitution of Kentucky, the following

ARTICLES OF INCORPORATION

are hereby adopted:—

(1) The name of the corporation is

"BEREA COLLEGE."

(2) Its principal place of business is Berea, in Madison County, Kentucky.

(3) Its object is the education of all persons who may attend its institution of learning at Berea, and, in the language of the original articles, "To promote the cause of Christ."

(4) There will be no capital stock.

(5) The following are the incorporators.

(Here follow the names.)

(6) The corporation will continue business under these Articles for one hundred years from and after the 31st of May, 1899.

(7) The affairs of the corporation will be conducted by twenty-five persons, who shall be called

"THE BOARD OF TRUSTEES OF BEREA COLLEGE,"

and the President of the College shall be one of these Trustees. Said Trustees, other than the President, shall be divided into six classes of four persons each, as hereinafter provided, the terms of one class to expire each year, their successors to be elected by the Board of Trustees, which shall also elect all officers of the Institution. The present Trustees are hereby designated to act from this date as follows, to-wit:—

(Here follow the names.)

Each of said Trustees shall hold his office until his term shall expire, as fixed by these Articles, and until his successor is elected; and said Trustee shall be elected and hold by classes as hereinbefore set out. A vacancy in any trustee-

ship or other office or position shall be filled by the Board of Trustees, and each person so elected shall fill out the expired term and serve until his successor is elected. Wm. Goodell Frost, now President, and T. J. Osborne, who has been and is acting Secretary and Treasurer, and the present Prudential Committee, shall continue to act until the next annual election. The present Investment Committee will continue in office until the next annual election, and until its successors are elected. An election for Trustees and Officers as their term shall expire, and as vacancies may occur, shall be held at Berea on the third Wednesday in June of each year. But if for any reason the Board of Trustees shall meet at a different date the election may be held at the date of the meeting.

(8) The corporation shall not at any time incur an indebtedness exceeding in the aggregate the sum of $50,000.

(9) The private property of the incorporators and members of the corporation shall not be subject to the payment of corporate debts.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 190.

BEREA COLLEGE

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

A state may make and enforce a law to protect its citizens from enforced association with those of different race and color. A state cannot make nor enforce a law to prevent the voluntary association of persons of different races in their private relations for purposes commendable in themselves.

A state may provide separate public schools, and by the exercise of the police power enforce separation of the races in the public schools. A state cannot, under the guise of police power, control voluntary attendance at a private school, with whose management and support the state has nothing to do, for the right of attendance is purely and exclusively private.

The brief of counsel for the Commonwealth advances neither argument nor authority to support such view of the police power. On the contrary, in *Mugler vs. Kansas,* 123 U. S., 623, more frequently cited by counsel than any other case, the court says on page 660:

> "As was said in *Munn vs Illinois,* 94 U. S., 113, "124, while power does not exist with the whole "people to control rights that are purely and ex- "clusively private, government may require 'each "citizen to so conduct himself, and so use his own "property as not unnecessarily to injure another.'"

Their brief discusses miscegenation, the separation of the races in public schools and upon common carriers and then asks, why cannot the State go one step farther and prohibit the coeducation of the races in private schools? The difficulty is that such attempted action is not one step farther. It is not in the same direction at all.

That laws relating to public schools and common carriers are cited as instances of analogous, though less drastic, applications of the police power, shows an entire misconception of this rather indefinite doctrine of overruling necessity. It is indeed difficult to determine, in certain given cases, how far the police power may interfere with a citizen's personal liberty or may take his property.

We can concede to the several states the highest degree of sovereign authority in matters calling for the exercise of the police power that any one may claim, and yet recognize the final authority of the Constitution and of the Fourteenth Amendment. There is no conflict, for the courts when called upon to examine the state law to be enforced under the police power, will determine whether or not the measure is necessary, reasonable and appropriate and has a real and substantial relation to the *protection* of the *public* in its safety, health or morals. If the law is found to be of such character, then it cannot abridge the

privileges and immunities of a citizen of the United States or of any one else, nor can questions of due process of law, or of equal rights arise.

An attempt to regulate by law the purely personal relations of persons attending a private school, founded for the purpose of advancing the cause of Christ, wherein no improper or seditious doctrine is taught or indecorous conduct allowed, bears no analogous relation to the control of public schools and common carriers, and is not an exercise of the police power at all, for the requisite conditions;—conditions precedent to the right to invoke this supreme law of self-preservation,—are lacking.

These conditions are four:

First—There must exist a danger to the public.

Second—That danger must be of a character calling for police action, *i. e.*, the public peace, the public safety, the public health or the public morality must be affected.

Third—The police measure must have a real and substantial relation to the end sought or rather to the threatened evil which is to be prevented.

Fourth—If so related and appropriate, it must be both necessary and reasonable, and not arbitrary.

Let us test by these four requirements the law relating to the public schools and the common carriers, and then the statute now in question.

In the case of public schools and public railways:

First—The legislature determines that there is a danger. The argument is: The natural antipathy between the two races is such that the two cannot be forced to associate together without public disaster; an attempt to so enforce association will in the case of the schools, lead to disorder, lack of discipline, and destroy the efficiency of the schools; and in the case of railroads, so great is the antipathy, that riots may result, or, at least, great mental

suffering and humiliation will be forced upon unwilling passengers.

Second—Such danger relates directly to the public safety and the general welfare.

Third—The only measure to prevent this condition from arising is to provide separate schools and to compel the railroads to provide separate coaches. If much separate accommodations are not provided, the scholars, being by law compelled to attend school, and the passengers being by necessity compelled to travel by means of the quasi-public railroad, will be forced into an association dangerous to the public peace and safety, because of the violent antipathy existing in many instances, in fact, quite generally, as is claimed. Such measure, *i. e.,* separate accommodations, is directly related to the end sought, *i. e.,* the *prevention of enforced association,* the *protection of the public* from the result which race antipathy might bring about, if the members of the two races were forced to associate together.

Fourth—Hence, if the Court thinks such measure necessary and reasonable, and not arbitrary, it follows that all four conditions exist and the police power, very properly may be invoked for public protection, for the safety and peace of society.

Apply this analysis to this act which seeks to prohibit a purely private school from accepting as pupils persons of the white and of the colored races.

First—The danger. What danger threatens? Health is not in question, neither is peace nor safety. The general welfare cannot be disturbed by race antipathy, for there is no enforced association. Whatever association there may be is purely voluntary.

Second—Morality. Can it be said that the public morality may be affected? In the cases cited, one can well see how the efficiency of a school or the comfort of travel may

be disturbed by enforced association because of race antipathy, but in order to relate this measure to the police power, the diametrically opposite position is taken and voluntary association is assumed to be dangerous to the public morality because of the irresistible attraction of the races for each other, leading to inordinate affections or immoralities.

Third—Relation to the end sought. Can a law which prevents white and colored persons from associating in a school, presided over by watchful and prudent teachers, have any relation to the prevention of the supposed evil? If there is any danger to public morality arising from the irresistible attraction of the races, no legislation can control it. This is, if a danger, not a danger to the public at large. It is primarily a danger to the individuals themselves.

If it is to be said that social equality cannot be enforced by legislation, how much more truly can it be said that voluntary association cannot be prevented by legislation?

Fourth—Reasonableness. It can hardly be contended that this measure is reasonable and necessary to reach the end sought, *i. e.*, the protection of society against the dangers of voluntary association of the races, when their free commingling is allowed to go unrestrained in all other private walks of life, as must of necessity be, and this character of association, under careful supervision, is, and from its very nature must be, the most innocent of all forms of voluntary association. To avoid the danger, if it is a danger, all association of the races would have to be prevented.

Returning to counsel's brief, we find nothing to controvert our position, which is briefly:—

With the personal occupations and the private contracts of persons, a state has no concern, provided nothing therein contained is in itself either immoral or seditious.

As heretofore stated, their brief rests upon the unwarranted assumption that in pari materia are the act in question, and laws prohibiting intermarriage, providing separate public schools, requiring common carriers to provide separate coaches for the two races.

We desire to show by parallel analogies how far from being in pari materia are this statute, and those above referred to, as well as all others dealing with the public welfare under the police power.

First—As to common carriers. If counsel claim that the right to control voluntary association in private schools can be deduced from the right to prevent the enforced association in public schools, by close analogy, a right to prevent the races from riding together in their own vehicles can be deduced from the right to prevent the enforced association in public coaches of common carriers.

But no one will be heard to suggest that a law could be enforced which would seek to prohibit me from riding with a colored person in my own carriage or wagon.

Second—As to quarantine. Health is a very natural and proper subject for the exercise of the police power. A contagious disease, however, is a subject of police power only as it relates to the public health and the enforced association with the disease or the compulsory exposure to the infection. The sole province of the police power is to prevent one from exposing others, without their knowledge or against their will, to a danger. The analogy, in this connection would be:—if from the right of control of attendance at public schools, can be inferred a right to prohibit mixed attendance at private institutions, similarly from the right of quarantine could be inferred a right to prohibit one from voluntarily incurring risk of disease.

And yet it is uncontrovertible that while strictest provisions may be made to guard you who do not wish to expose yourself, no quarantine law ever devised would prevent me from going to you if you were infected, pro-

vided I did not subsequently associate with others, or from opening my house and receiving all those sick of contagious diseases; in fact, this is exactly what a private hospital does.

Third—as to vaccination. In the very recent case of *Jacobson vs. Massachusetts*, 197 U. S., 11, public vaccination is put upon the ground solely that the health of the public at large cannot be endangered by enforced association with the unvaccinated, in time of public danger from a prevailing epidemic. The Court says, p. 28:

> "We say necessities of the case because it might "be that an acknowledged power of a local com- "munity to protect itself against an epidemic threat- "ening the safety of all, might be exercised in par- "ticular circumstances and in reference to particu- "lar persons in such an arbitrary, unreasonable "manner as might go so far beyond what was rea- "sonably required for the safety of the public, as "to authorize or compel the courts to interfere for "the protection of such persons."

And cites with approval the case of *Viemeister vs. White, President*, 179 N. Y. 235, which involved the validity of a statute excluding from the public schools all children who had not been vaccinated.

Applying the analogy above twice mentioned, we should claim that because vaccination at public schools can be enforced, the conducting or attending a private school where unvaccinated children were received could be declared criminal. But vaccination cannot be enforced at private schools, except in times calling for general precautions, the danger being such as, "under the necessities of the case" would justify the compelling of every one or of all children to be vaccinated.

Fourth—as to labor, buildings, &c. This distinction between matters of public concernment and those of private

contract has been very recently considered by this Court in cases involving entirely different subjects, but resting upon similar reasoning. A law fixing a legal day's work at eight hours upon public municipal work, was upheld (*Aiken vs Kansas*, 191 U. S. 207); but in matters of private contract, it was held that a law limiting the hours of labor was unconstitutional and in violation of the Fourteenth Amendment (*Lockner vs. State of N. Y.* 198 U. S. 45) unless the occupation were in itself clearly deleterious. (*Holden vs. Hardy*, 169 U. S. 366.)

The last case cited illustrates clearly the fundamental proposition that the public must be affected; and the distinction between those laws which seek to control private rights, and are unconstitutional, and those which compel a man to conduct his business, even his private business, so as not to injure or endanger the public, and may, when reasonable, be a valid exercise of the police power, is illustrated by reference to ordinances for fire escapes on hotels, theaters, factories, &c.; for ventilation of mines, &c.; for protection of dangerous machinery, &c.

All such measures rest, in the final analysis, on an effort to protect the public against some danger to its safety or health.

This Court has itself spoken of such cases as "border ones", (*Lockner vs. People of State of N. Y.* 198 U. S. 45), and they remain within the line only as long as they relate to the public or to a certain class of individuals, and further seek to protect such class from an unquestioned, indisputable and imminent danger.

This Court said in speaking of such cases of employment recognized as dangerous to health or life:

> "But the fact that both parties are of full age and "competent to contract does not necessarily deprive "the State of the power to interfere where the par- "ties do not stand upon an equality, or where the "*public* health demands that one party to the con-

"tract shall be protected against himself." (*Holden "vs. Hardy*, 169 U. S. 366-397)."

Fifth—As to intermarriage. It is difficult to see why this subject should have been referred to. It bears not even a remote analogy to the subject matter of this statute, as do in more or less degree the matters dealt with by the four classes of laws above mentioned. Marriage is not a private contract. It is a public status not to be entered into or left at will. Every civilized state controls marriage in all of its terms and conditions. Moreover, the rights of parties seeking to enter the marriage relation are privileges vested in them by virtue of their state citizenship, and are not privileges belonging to them as citizens of the United States to which the Fourteenth Amendment could apply.

That the privileges abridged by this statute of Kentucky are those inherent in citizens of the United States, as distinguished from those secured by State citizenship, has not been questioned.

It is plain from all the decisions cited that the right of a teacher to earn a livelihood by teaching, and the right of a person to attend school and to obtain an education, are fundamental rights of all citizens, whether citizens of the State in which the school is situated, or of other States.

"Any person is at liberty to pursue any lawful "calling and to do so in his own way not encroach- "upon the rights of others."

Cooley Constitutional Limitations, p. 889.

"It is a part of every person's civil liberty to "provide for his own education as he may have the "means."

Cooley on Torts, p. 286.

It is equally clear that the students as well as the college are deprived of their liberty, without due process of law. The relation between the students and the college is con-

tractual. For a consideration, a small tuition fee, the college and its teachers undertake to impart instruction.

> "The liberty mentioned in that amendment means "not only the right of the citizen to be free from "the mere physical restraint of his person, as by "incarceration, but the term is deemed to embrace "the right of the citizen to be free in the enjoyment of "all his faculties; to be free to use them in all "lawful ways; to live and work where he will; "to earn his livelihood by any lawful calling; to pur- "sue any livelihood or avocation, and for that pur- "pose to enter into all contracts which may be proper, "necessary and essential to his carrying out to a suc- "cessful conclusion the purposes above mentioned."
>
> *Allgeyer vs. Louisiana*, 165 U. S. 578-589.
> See also pages 590, 591 and 592 and cases there cited.
> *Butchers' Union Company vs. Crescent City Company*, 111 U. S. 746-762.
> *Powell vs. Pennsylvania*, 127 U. S. 678-684.

This act of the General Assembly of the State of Kentucky not only violates the direct provisions of the Fourteenth Amendment to the Federal Constitution, but it violates the common sense of mankind, and seeks to destroy the work of half a century which has borne no fruits of evil or danger, but, on the contrary, has stood as a conspicuous example of a humanizing and uplifting moral agency.

A careful re-perusal of our opponents' brief discloses that the only basis of the validity of the act claimed is a remote inference that in some way the co-education of the races in a private school may threaten race identity—that this act will protect the purity of blood and prevent amalgamation.

Race amalgamation must be either legitimate or illegitimate. Legitimate amalgamation is prevented now by the constitution of Kentucky. Illegitimate amalgamation is a

curse not only of Kentucky, but of many other localities. It cannot be prevented by legislation.

Absolute prohibition of the voluntary association of the races, in factories, in churches, on the street, everywhere, might have some effect, but no such law would be constitutional. Could such laws be enacted, we do not think that they would have any tendency towards prevention of the mingling of blood, but of all efforts to prevent voluntary association, the last, not the first, should be the destruction of a private school, where are taught lessons of sobriety and religion, where by precept and example, the students are impressed with their duty to themselves and to their Creator, and are guarded from the dangers that beset them in all other walks of life.

The common law has ever regarded with favor the control by educational institutions of their internal, social and administrative affairs. The principle of a certain academic freedom was early recognized, so that by usage, universities, in England, established a jurisdiction over their own students independent, in a degree, of the civil courts.

Likewise, in this country we find in the famous Dartmouth College case, the following:

> "There is not a case to be found which contradicts "the doctrine laid down in the case of Phillips vs. "Bury, namely, that a college founded by an individ- "ual or individuals, is a private charity, subject to the "government and visitation of the founder, and not "to the unlimited control of the government." (4 Wheat. 506.)

We have noted above the right of a state to regulate the operation of certain private industries, such as mines and factories, upon the grounds that such occupations are in themselves either dangerous to life or deleterious to health, and that the interests of the public are involved. But with

the freedom of thought and conduct in an institution of learning, no state has attempted to interfere, for the general law of the land has recognized the principle that it makes for the progress of the world for educational institutions to enjoy the largest possible independence, so that there may be diversity of usage and method continually adapted to particular conditions and advancing enlightenment.

No influence in the entire South has been so potent against the evil of race amalgamation as that of Berea College.

The College has always recognized the inherent differences in the races. There is nothing before this Court to show that any teaching of social equality has ever been promulgated. Such is not the fact. Lessons of mutual respect and of Christian forbearance may perhaps be inferred from the purpose of the College's foundation "to promote the cause of Christ". Nothing more.

Berea College, which in the words of the indictment "did unlawfully and wilfully permit and receive both the white and negro races as pupils for instruction in said college", did, by so doing (and for many years past) perform for Kentucky the greatest service yet rendered, in the prevention of the evil, which it is now claimed its existence and its practices threaten to bring to pass.

It is true that the statute is in form general, but it has been assumed and admitted that it is directed against Berea College. Counsel for the Commonwealth, in their brief, not when referring to the indictment, but to the constitutionality of the act, speak of Berea and of Berea only.

We may be pardoned for calling attention to some well known facts outside the record, not that they are necessarily of such character as to command the judicial notice of the Court, but are illuminative of the unreasonableness of the law.

Berea College is in no sense a local school. It is a national institution. It is supported by contributions from citizens of many states. More of its teachers are citizens of other states than of Kentucky. Its students come from nearly every state and from foreign countries.

The institution has attracted wide interest by reason of its special educational adaptations for the great mountain region of the South which it has been foremost in bringing to public attention. Upon its official publications it carries, among others, the following endorsement:

> "The undersigned confidently commend this cause
> "as one of National concern:
>
> Chas. W. Eliot,
> W. Murray Crane,
> Wm. Croswell Doane,
> Daniel C. Gilman,
> David J. Brewer,
> Woodrow Wilson."

Should, therefore, the Court come to view the reasonableness of this legislation, the wide interests involved should not be overlooked.

The Commonwealth of Kentucky has attempted, under guise of the police power, not to regulate some internal difficulty peculiar to itself, but to prohibit the work of an institution in which every citizen of the United States is interested.

Were it conceivable that the States of Maryland, Massachusetts and Connecticut should make and enforce similar laws, the great Universities of John Hopkins, Harvard and Yale would find themselves engaged in criminal acts, and would find themselves compelled to close, or to abandon their precepts and practice of centuries.

Berea is quite as national in its character as any of these and is, in its smaller way, equally a factor in the progress of civilization.

Such statute is not only unconstitutional, and contrary to the practices of civilized peoples, and in violation of the fundamental rights of mankind, but is so contrary to common sense and common usage, that even among races which do not enjoy the civilizing processes of this age of enlightenment, it could not find support.

There is no spot upon this earth, which has the protection of any form of government, where devoted men and women could be fined as criminals, because they gathered students of good moral character, without discrimination as to race or creed, and by teaching the rudiments of knowledge and the elements of religion, sought to contribute to the enlightenment of the world.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

Supreme Court of the United States

No. 120/2

BEREA COLLEGE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

In error to the Court of Appeals of the State of Kentucky.

Brief for the Commonwealth of Kentucky.

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No. 546.

Supreme Court of the United States.

OCTOBER TERM, 1906.

BEREA COLLEGE, ... *Plaintiff in error,*

vs.

THE COMMONWEALTH OF KENTUCKY, ... *Defendant in error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR THE DEFENDANT IN ERROR.

The Plaintiff in error presents this writ of error from a decision of the Supreme Court of Kentucky, holding an Act of the General Assembly of Kentucky, approved March 22, 1904, prohibiting white and colored persons from attending the same school, constitutional. This Act, and the opinion of the learned Chief Justice of the Kentucky Court of Appeals together with other pertinent acts and laws are printed as an appendix to this brief.

QUESTION FOR REVIEW.

Does the Act of the General Assembly of Kentucky, approved March 22, 1904, as construed and interpreted

by the Supreme Court of Kentucky, deny to the plaintiff in error the equal protection of the law, or abridge the privileges or immunities of its teachers and pupils; or does said Act deprive said teachers or pupils of liberty or property without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution? The decision of these questions require a determination whether the Statute is a valid and reasonable exercise of the Police Power inherent in the sovereign State of Kentucky, or an arbitrary, unreasonable and unwarranted exercise of said power by said State.

FIRST.

THE POLICE POWER.

The Statute is a reasonable exercise of the power. Legislative power is the power and authority vested in the General Assembly to make laws. This power, within constitutional limitations, is absolute and complete. The object and purpose of every government is to foster and promote the happiness and general welfare of its people. The welfare of the State and community is paramount to any right or privilege of the individual citizen: The rights of the citizen are guaranteed, subject to the welfare of the State. **Hence, the State has not surrendered its sovereign power of legislation for the general welfare, by constitutional guaranties of individual liberty.**

> **"Individual liberty of action or right must give away to the greater right of the collective people in the assertion of a well defined policy, designed and intended for the general welfare."**
>
> "In its broadest acceptance, the police power

means the general power of government to preserve and promote the public welfare, even at the expense of private rights."

Cooley's Const. Lim., 6th Ed., 704.

New Orleans Gas and Light Co. v. Hart, 40 La., 474.

"Police power is the right of the State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in Congress by the Federal Constitution."

Lake View v. Rose Hill Cemetery Co., 70 Ill., 192:

"The police power of a State is co-extensive with self-protection, and is applicably termed the law of overruling necessity. It is the inherent and plenary power in the State, which enables it to prohibit all things hurtful to the comfort and welfare of society."

Hare's American Constitutional Laws, page 766:

"The police power may be justly said to be more general and pervading than any other. It embraces all operations of society and government; all the constitutional provisions presupposes its existence and none of them preclude its legitimate exercise."

Police power is the inherent right of self-preservation in the State, and is without and beyond the Constitutional guaranties of individual rights and liberties.

Tiedeman's Limitations of Police Power, page 212.

1 Hare's American Constitutional Law, 766.

111 U. S., 746, Justice Bradley.

165 U. S., 580, Justice Peckham.

State v. Holden, 14 Utah, 718.
Commonwealth v. Alger, 7 Cush., 85.
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22 A. & E. Ency. Law, 2nd vol., 937.

PUBLIC POLICY IN KENTUCKY.

It is the contention of the State that **this Statute, the constitutional provision and the Statutes of Kentucky providing for separate public schools for the two races; the Statute prohibiting the intermarriage of the two races; the Statute incapacitating the issue of such marriages from inheriting; and the Statute requiring common carriers to provide separate coaches for the two races,** are in **pari materia;** and the Commonwealth, in the enactment and passage of all these laws had but **one common purpose and end—to preserve race identity, the purity of blood, and prevent an amalgamation, and that such is the settled public policy of the State.** This will be seen from the following constitutional provision and Statute:

PUBLIC SCHOOLS.

Constitution, Sec. 187:

> "In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."

Kentucky Statutes, Sec. 4428:

> * * * "Such contract shall expressly provide that all children of pupil age residing within the district shall have the privilege of attending the said high schools, academy or college for at least five months during the school year without payment of the tuition fees; but nothing in this chapter shall be construed to authorize any white person to attend

a common school or other institution of learning established for colored children, or any colored person to attend a common school or other institution of learning established for white children."

The marriage between the two races is prohibited.

Kentucky Statutes, Sec. 2111:

"If any authorized person shall knowingly, with or without license, solemnize a marriage such as is herein prohibited, he shall be imprisoned not less than one nor more than twelve months, or fined not exceeding one thousand dollars, or both."

Kentucky Statutes, Sec. 2114:

"Any party to a marriage within the incestuous degree herein prohibited, or **between a white person and a negro or mulatto,** shall be fined not less than five hundred dollars nor more than five thousand dollars, and if, after conviction, the parties continue to cohabit as man and wife, they, or either of them, shall be imprisoned not less than three nor more than twelve months in the penitentiary."

Kentucky Statutes, Sec. 2097:

"Marriage is prohibited and declared void, * * * (2) **between a white person and a negro or mulatto.**"

Kentucky Statutes, Sec. 2098:

"The issue of an illegal or void marriage shall be legitimate, except that the issue of an incestuous marriage, found such by the conviction or judgment of a court, in the lifetime of the parties, or **of a mar-**

riage between a white person and a negro or mulatto, shall not be legitimate; and where one of the parties is an idiot or lunatic, the issue shall be legitimate as to both."

Common Carriers to Furnish Separate Coaches.

Kentucky Statutes, Sec. 795, in part provides:

"That any railroad company, corporation or persons * * * doing business in this State, * * * or who may hereafter be engaged in running or operating any of the railroads of this State, either in part or in whole, either in their own name or that of others, **are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad.**"

It is the settled policy of the several states that the purity of blood and the indentity of each race shall be preserved; and that all laws which are necessary to prevent an amalgamation are within the reasonable exercise of the police powers.

THIRD.

MARRIAGE.

Laws prohibiting intermarriage between the two races, in force not only in the Commonwealth of Kentucky, but in many of the States, have been held to be a reasonable and valid exercise of the police power of the State; and do not abridge any right or privilege secured by 14th amendment, to either of said races.

Ex Parte Hobbs, 1 Woods, 537 and 543.

State v. Gibson, 36 Ind., 402 and 405.

State v. Jackson, 80 Mo., 177.
State v. Harston, 63 N. C., 453.
Green v. State, 29 Am. Rep., 742.
Brook v. Brook, 9 H. L., 193.
Trasher v. State, 3 Tex. App., 263.
Doc Lonas v. State, 3 Heisk, 309 and 310.

In State v. Gibson, supra in passing upon the constitutionality of a statute of Indiana prohibiting the intermarriage of the races, the Court said:

> "In this State marriage is treated as a civil contract, but it is more than a mere civil contract. It is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations exist and are based. The right, in the States, to regulate and control, to guard, protect and preserve this God-given civilizing and christianizing institution is of inestimable importance, and can not be surrendered, nor can the States suffer or permit any interference therewith. If the Federal government can determine who may marry in a State, there is no limit to its power. It can legislate upon all subjects connected with, or, growing out of this relation. It can determine the rights, duties and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise and absorb all the powers of local and domestic character. This would result in the destruction of the States. The Federal

government can not exist without the States, but the States could exist without the Federal government, as they did before its creation. There is no necessity for the destruction of either. The authority of the Federal government begins where the authority of the State ceases. The State government controls all matters of a local and domestic character. The Federal government regulates matters between the States and with foreign Governments. There is, and can be, no conflict between the State and Federal governments, if each will act within the sphere assigned to each. The necessity for State and local self-government is shown by the character of our people. The customs, habits and thoughts of the people in one State differ widely from those of the people in another State, and this results in different laws."

"The laws of this State provide that males of the age of seventeen and females of the age of fourteen years, not within the prohibited degrees of consanguinity, are capable of entering into the contract of marriage. The statute provides that the following marriages are void: When one of the parties is a white person, and the other possessed of one-eighth or more of negro blood; and when either party is insane or idiotic, at the time of marriage. Under the police power possessed by the States they undoubtedly have the power to pass such laws. The people of this State have declared that they are opposed to the intermixing of races and all amalgamation. If the people of other States desire to permit a corruption of blood, and a mixture of races, they have the power to adopt such a policy. When the legislature of the

State shall declare such a policy by positive enactment, we will enforce it, but until thus required we shall not give such policy our sanction."

"This subject is discussed with great ability, clearness and force by the Supreme Court of Pennsylvania, in the recent case of The Philadelphia & West Chester R. R. Co. v. Miles, 93 Am. Dec., 747."

In Ex Parte Hobbs, 1 Woods, 537 and 543, the Court said:

"The marriage relation between white persons and persons of African descent is prohibited, and declared to be null and void by the law of Georgia: Held, That marriage laws are under the control of the States, and that the law named is not annulled or affected by the civil rights bill of Congress or the Fourteenth Amendment to the Constitution of the United States. * * *

"The marriage relation, which is a civil institution, has hitherto been regulated and controlled by each State within its own territorial limits, and I can not think it was intended to be restrained by the amendment, so long as the State marriage regulations do not deny to the citizen the equal protection of the laws. Nor do I think that the State law operates unequally; the marriage relation between whites and colored can not exist under the Statutes of this State—it is null and void as to both."

In State v. Hairston, 63 N. C., 453, it is said:

"The marriage relation is a peculiar and important one. The Courts treat it as a contract, only in the sense that contract—consent of parties—pre-

cedes it, and is essential to its validity. **But when formed, it is more than a civil contract, it is a relation, an institution, affecting not merely the parties, like business contracts, but offspring particularly, and society generally.''**

In Brook v. Brook, 9 H. L., 193, Lord Cromwell said:

''There can be no doubt of the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry; how they shall marry; and the consequences of their marriage.

In Green v. State, 29 Am. Rep., 742, the Court said:

''These homes, in which the virtues are most cultivated and happiness most abounds, are the true **officinae gentium—the nurseries of States. Who can estimate the evil of introducing into their most intimate relations elements so heterogeneous that they must naturally cause discord, shame, disruption of families and estrangement of kindred?** While with their interior administration the State should interfere but little, it is obviously of the highest public concern that it should, by general laws adapted to the state of things around them, guard them against disturbances from without.

''Hence it is that, if not in every State in the Union, in all of them in which any considerable numbers of the negro race resided, statutes have been enacted prohibiting intermarriage between them and persons of the white race. Said the Supreme Court of Pennsylvania in a recent case: 'Why the Creator made one white and the other black, we do not know; but the fact is apparent, and the races are distinct.

each producing its own kind and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar. * * * The natural law, which forbids their intermarriage and that amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.' "

In Doc Lonas v. State, 3 Heisk (Tenn.), 309 and 310, Supra, the Court said:

"The highest and holiest duty of every government is to provide for the happiness and general welfare of its people. How and in what manner this is to be best subserved, is a question for the political power; and the **police power**, which is inherent in all governments, is to be exercised without question. * * *

The laws of civilization demand that the races be kept apart in this country. The progress of either does not depend upon an admixture of blood. A sound philanthropy, looking to the public peace and the happiness of both races, would regard any effort to intermerge the individuality of the races as a calamity, full of the saddest and gloomiest portent to the generations that are to come after us."

In State v. Jackson, 80 Mo., 177, Supra, the Court said:

"All of one's rights as a citizen of the United States will be found guaranteed by the Constitution of the United States. If any provision of that instru-

ment confers upon a citizen the right to marry any one who is willing to wed him, our attention has not been called to it. If such be one of the rights attached to American citizenship, all our marriage acts forbidding intermarriage between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother."

FOURTH.

PUBLIC EDUCATION.

Laws of several States, as well as Kentucky, prohibit the two races from attending the same public school, and provide separate public schools for the two races. These laws have been held to be a reasonable and valid exercise of the police power of such States, and not to abridge any right or privilege granted by the 14th amendment to either of the races.

Lehew v. Brummell, 103 Mo., 551 and 552.
Cary, et al v. Carter, 48 Ind., 362.
Martin v. Board of Education, 42 W. Va., 515.
State of Ohio v. McCann, 21 Ohio, 210.
Cisco v. School Board, 161 N. Y., 598.
Bertonneau v. Board of Directors, 3 Woods, 180.

In Lehew v. Brummell, 103 Mo., 551, Supra, the Court in passing on a statute requiring the two races to attend separate schools, said:

"The framers of the Constitution, and the people by their votes in adopting it, it is true, were of the opinion that it would be better to establish and maintain separate schools for colored children. The wis-

dom of the provision is no longer a matter of speculation. Under it, the colored children of the State have made a rapid stride in the way of education to the great gratification of every right-minded man. The schools for white and black persons are carried on at a great public expense, and it has been found expedient and necessary to divide them into classes. That separate schools may be established for male and female pupils can not be doubted. No one would question the right of the legislature to provide separate schools for neglected children who are too far advanced in years to attend the primary department; for such separate schools would be to the great advantage of that class of pupils. So, too, schools may be classed according to the attainments of the attendants in the branches taught. That schools may be classed on these and other grounds without violating the clauses of the Federal constitution now in question, must be conceded. But it will be said the classification now in question is one based on color, and so it is; **but the color carries with it natural race peculiarities which furnish the reason for the classification.** There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their advantage."

In Cary, et al v. Carter, 48 Ind., 362, the Court said:

"It being settled that the legislature must provide for the education of the colored children as well as for the white children, we are required to determine whether the legislature may classify such children, by color and race, and provide for their education in separate schools, or whether they must attend the same school without reference to race or color. In our opinion, the classification of scholars, on the basis of race or color, and their education in separate shools, **involve questions of domestic policy which are within the legislative discretion and control,** and do not amount to an exclusion of either class."

In Martin v. Board of Education, 42 W. Va., 515, the Court in construing a section of the Constitution of the State of West Virginia, which provided that "white and colored children shall not be taught in the same school," said:

"The only **privilege** that appears to be **denied to** colored children in this section **is that of association** with white children, and vice versa. If it had required that they **should** be taught in the same school, then it would have been a compulsory infringement of the rights of both, but, as it is now, it treats both alike, and places them precisely on the same footing."

In State v. McCann, et al, 21 Ohio, 210, Supra, the Court said:

(This statute) "only regulates the mode and manner in which this right shall be enjoyed by all classes of persons. The regulation of this right arises from

the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all. But this task must, of necessity, be left to the wisdom and discretion of some proper authority. The people have committed it to the general assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all. * * *

Equality of right does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. **Any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either.** There is, then, no ground upon which the plaintiff can claim that his rights under the 14th amendment have been infringed."

In Bertonneau v. Directors, etc., 3 Woods, 180, Supra, in passing upon a like statute the Court said:

"Both races are treated precisely alike. **White children and colored children are compelled to attend different schools.** That is all. The State, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all. The State may be of the opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. **By such a policy can it be**

said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the Constitution of the United States. **Equality of right does not necessarily imply identity of rights.''**

So the Statute here in question imposes no burden upon either race, and gives to each the same opportunity and privilege to acquire an education. If it be true, as sometimes said, that race prejudices exist in this State, then the co-education of the two races would tend to increase the same, by the close association in the school rooms; and, although some may be found of each race who are willing to associate themselves together, it is however, the safety, good order, peace and general welfare of the State, by which the legislature is guided.

FIFTH.

SEPARATE COACHES OR CARS.

The laws of several States, including Kentucky, require common carriers to provide separate cars or coaches for the white and colored persons who travel over their lines. These laws have been upheld by the Supreme Court of the United States as a reasonable and valid exercise of the police power; and not to abridge any immunity or privilege secured by the 14th amendment to either of the races.

West Chester & Philadelphia R. R. Co. v. Miles, 93 Am. Dec., 747-8.

Smith v. State, 100 Tenn., 494.
L. O. & T. R. R. Co. v. State, 133 U. S., 578 (33: 784).

Plessy v. Ferguson, 163 U. S., 537 (41: 260).
C. & O. Railway Co. v. Kentucky, 179 U. S., 392, (45: 247).

In West Chester, etc., R. R. Co. v. Miles, 93 Am. Dec., 747, Supra, the Court said:

"A railroad company has the right and is bound to make reasonable regulations to preserve order in its cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may, on extraordinary occasion, stop his train and eject the unruly and tumultuous. But he has not the authority of a peace officer to arrest and detain offenders. He can not interfere in the quarrels of others at will merely. In order to preserve and enforce his authority as the servant of the company, it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation than to quell them. **The danger to the peace engendered by the feeling of aversion between individuals of the different races can not be denied.** It is the fact with which the company must deal. **If a negro take his seat beside a white man or his wife or daughter, the law can not repress the anger or conquer the feeling of aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it.**"

"It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterwards, the breach of the peace it may have caused. These views are sustained by high authority. Judge Story, in his Law of Bailments, stating the duty of passengers 'to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers as well as for their own proper interest,' says 'the importance of the doctrine is felt more strikingly in cases of steamboats and railroad cars.' "

"The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this State, resulting from nature, law and custom, as makes it a reasonable ground of separation. **The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which he always imparts to his creatures when he intends that they shall not overstep the natural boundaries he has assigned to them.** The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures. **The tendency of intimate social intermixture is to amalgamation, contrary to**

the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. **The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage.** But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. **It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix.** The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

In L., N. O. & T. Railway Company v. Mississippi, 133 U. S., 578 (33-789), Supra, it was held that the State:

"Could compel railroad companies to provide, within the State, separate accommodation for the two races."

In Plessy v. Ferguson, 163 U. S., 545 (41:259) Supra, the Court said:

"We think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges nor immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the 14th amendment. * * * In this connection it is also suggested by learned counsel for the plaintiff in error that the same argument that will justify the State legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street and white people on the other, or requiring white men's houses to be painted white and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. **The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good and not for the annoyance or oppression of a particular class.** * * *

So far as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a **reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness itt is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.**"

"Gauged by this standard we can not say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the 14th amendment than the acts of **Congress requiring separate schools for colored children in the District of Columbia,** the constitutionality of which does not seem to have been questioned. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the State legislature, and should enact a law in precisely similar terms, it would, therefore, relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudice may be **overcome by legislation, and that equal**

rights can not be secured to the negro except by an enforced commingling of the two races. We can not accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said in the New York Court of Appeals, in People v. Gallagher, 93 N. Y., 438, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized, and performed all the functions respecting social advantages with which it is endowed.'

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. **If the civil and political rights of both races be equal, one can not be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States can not put them on the same plane.''**

SIXTH.

COMMON CARRIERS—PUBLIC SCHOOLS—PRIVATE SCHOOLS.

Several states have constitutional and statutory laws providing for separate public schools, and requiring

railroad companies to provide separate coaches for white and colored passengers. It was contended in the State Court that if separate accommodations were not made and provided for in the public schools and on the railroads, it would not be possible for persons of one race to use these public utilities without mingling with persons of the other race.

> "There is, therefore, substantially an inforced association of the two races, and such inforced association may very properly be prevented by legislation, * * * . The reasons, therefore, for the enactment of separate coaches and others of like character and the effects, are altogether different from any that can be suggested in support of the legislation involved in this case."

The fallacy in this argument lies in the assumption that the whole of the white race has an antipathy toward the colored race, and vice versa. While those who have such antipathy for each other, were, in the use of the public schools and on the common carriers, prior to such legislation providing for their separation, forced to associate together; yet those who had no such antipathy, but desired and had mutual desire to associate with the other race in such public schools and on the common carriers, were, after the enactment of such legislation, forced to separate. There are some of both races who were and are opposed to this separation of the two races in the public schools and on the common carriers.

We must look deeper for the philosophy and reason upon which the courts have based their opinions and judgments in upholding such legislation. **The courts**

have upheld this class of legislation upon the ground that such enactments are a reasonable and necessary exercise of the police power for the general welfare of the State, in order to preserve the identity of the races, to maintain the purity of blood and avoid an amalgamation. This is also the object of the Statute in question; and as stated before, all these laws are in pari materia and have for their object this common purpose.

SEVENTH.

DISCRETION OF THE LEGISLATURE TO DETERMINE PRIMARILY, WHAT COMES WITHIN THE POLICE POWER.

The Legislature of Kentucky is vested with a large discretion and is at liberty to act for the preservation of the public peace and general welfare. The political rights of the two races may be equal without being identical. The conditions of this Statute apply equally to both races.

In Mugler v. Kansas, 123 U. S., 678 (31: 210), the Court said:

> "Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police pow-

ers of the State, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health or the pubic safety."

In L. & N. R. R. Co. v. Kentucky 161, U. S. 677 (40: 859), to Court in speaking of the police power said:

> "The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, **if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."**

EIGHTH.

GOOD FAITH.

The act of March 22, 1904 was enacted by the Commonwealth of Kentucky, "in good faith for the promotion of the public good and not for the annoyance or oppression of the colored race."

By the emancipation of the colored race, and after the adoption of the 13th, 14th and 15th Amendments to the Federal Constitution, the Commonwealth of Kentucky in her sovereign capacity was, at the close of the civil war, called upon to protect and provide for this unfortunate race. Untutored in the arts of government, without an education, without experience and without an individuality, the colored race was ushered into the highest responsibility of American citizenship—it was

given the right of suffrage and required to wield the ballot in the evolution of a government of, by and for the people. Kentucky did not hesitate or shrink from this new duty, but at once set about the task of the education and the uplifting of the race in order that it might intelligently discharge the duties which the new condition had brought to it.

We have had printed in the appendix the several acts of the General Assembly of Kentucky providing for the education of the negroes which will show, step by step, the generosity toward, and kindly consideration of this race by the people of Kentucky, who, as well as the white people of the entire Southland, more than any other people, have the interest of this race at heart.

By an act of Feb. 16, 1866, all taxes collected from negroes were applied and used entirely for the benefit of said race. "One half, if necessary, to go to the support of their paupers, and the remainder to the education of their children.

By an act of February 23, 1874, the fund was increased by a capitation tax, a dog tax, the taxes on suits, deeds and license, all fines, penalties and forfeitures on colored persons were added; all sums received by virtue of an act of Congress distributing public lands are also applied to the fund for the education of the negroes.

By the act of May 12, 1884, it was further supplemented. In the case of Dawson v. Lee, 6 R., 413, the Kentucky Court of Appeals held the act of February 23, 1874 unconstitutional and held that the negro children of the State, were entitled to an equal per capita of the entire school fund of the Commonwealth. From this time, there has been no discrimination in the distribution of the "school fund," and for such continued distribution,

the following provision was made in section 187 of the present Constitution.

> "§ 187. EACH RACE TO SHARE FUND EQUALLY—SEPARATE SCHOOLS—**In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained.**"

Colored children are now, not only given the same advantages that are given to the white children, but the Commonwealth, by act of May 22, 1893 provided for a colored State Normal School, which as amended by the act of March 18, 1902, has established a State Institution to which colored children may go and complete at public expense the education begun, but necessarily left incomplete in the common public schools. By this generosity of the State's policy, school houses for the education of the colored race, built and supported by a voluntary system of taxation by the white taxpayers, dot every county in the State.

The Commonwealth, in sympathy with the movement of the century to help those who are unable to help themselves, has by a liberal and generous appropriation provided for the education and training of the blind and deaf mutes of the colored children of the State.

NINTH.

THE FOURTH SECTION OF THE STATUTE.

This section was held to be an unreasonable and arbitrary provision, and therefore, unconstitutional, but the remainder of the Statute was held to be a complete and

consistent law within itself, prohibiting the co-education.

TENTH.

INDICTMENT.

The sufficiency of the indictment herein was a question of local practice and procedure and for the decision of the State Court alone; and the overruling of the appellant's demurrer to the said indictment does not present any federal question for review.

Caldwell v. Texas, 137 U. S., 699, (34:818).
Davis v. Texas, 139, U. S., 657, (35: 302).
Bergeman v. Parker, 157 U. S., 655, (39: 846).
Howard v. Fleming, 191 U. S. 127, (48: 124).

ELEVENTH.

FACTS.

This Court will not weigh or review the evidence on the trial, nor the facts alleged in said indictment and admitted on demurrer.

In Clipper Min. Co., v. Eli Min. & L. Co., 194 U. S. 222, (48: 948) the Court said:

> "It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the conclusions of the highest court of a state upon questions of fact."

Minneapolis & St. Louis R. R. Co. v. Minnesota, 193 U. S., 553, (48: 619).

Southern B. & L. Association v. Ebrough, 185 U. S., 119, (46:833).

TWELFTH.

JURISDICTION OF THE LEGISLATURE.

The legislature of Kentucky was and is vested with the power and jurisdiction to say whether or not the association of the white and colored children of the State and in one and the same school at the same time, is detrimental to the peace, morals and welfare of the State. Neither the Federal Constitution, nor the 14th Amendment thereto has taken this right away from the State of Kentucky.

In Mugler v. Kansas, 123 U S., 678, (31: 210) the Court said:

> "**Under our system that power (police power) is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety.**"

In Plumley v. Mass., 155 U. S., 460, (39: 223-230), the Court quoting from Chief Justice Marshall in part, said:

> "Presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which re-

tain and exercise all powers not delegated to the Union, **the judiciary of the United States should not strike down a legislative enactment of a state—especially if it has direct connection with the social order, the health and morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the National Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern.''**

THIRTEENTH.

CLASSIFICATION FOR PURPOSE OF EDUCATION.

Such a classification is not special legislation. Such a classification may be made with reference to the sexes; or it may be made with the reference to the races; and such a classification will not be an unreasonable or arbitrary exercise of the police power; nor will such a classification, which applies to all under like circumstances and conditions, deny to either race the equal protection of the law, and as heretofore stated, **other states have, as well as Kentucky, classified and provided separate public schools for the two races; other states have, as well as Kentucky, classified and required the common carriers therein to provide separate coaches for the two races; other states have, as well as Kentucky, prohibited the intermarriage of the two races, and have declared the issue of such marriage illegitimate and incapable of inheriting. This Honorable Court,** when called upon to pass on such legislation, **has uniformally held** the same to be constitutional, and that when the same op-

portunity was afforded to each, the same accommodation was given to each, and the same prohibitions were extended to both races, **such classification and legislation was clearly within the police power of the State, and did not deny to either race the equal protection of the law or deprive either of any liberty or property guaranteed by the Fourteenth Amendment.**

In Leuhew v. Brummell, 103 Mo., 551, the Court in discussing the 14th Amendment as applied to a statute providing for separate public schools, said:

> "That schools may be classified on these and other grounds, without violating the clauses of the Federal Constitution now in question, must be conceded. **But, it will be said, the classification now in question is one based on color, and so it is, but the color carries with it natural race peculiarities which furnish the reasons for the classification.**"

In Cary v. Carter, 48 Ind., 362, the Court said:

> "In our opinion, **the classification of scholars on the basis of race or color,** and **their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either race.**"

In State v. McCann, 21 Ohio, 210, the Court said:

> "**Equality of right** does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating child-

ren of both sexes in the same school. * * * . **Any classification which preserves, substantially, equal school advantages, is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either.** * * * * * * * Both races are treated precisely alike. White children and colored children are compelled to attend different schools."

In ex parte Hobbs, 1 Woods, 337-343, the Court recognized the right **to classify the races as to marriage** and said:

"The marriage relation between white persons and persons of African decent, is prohibited and declared to be null and void by the law of Georgia. **Held, that marriage is under the control of the State, and that the law named is not annulled or affected by the Civil Right's Bill of Congress or the Fourteenth Amendment to the Constitution of the United States.**"

In Brook v. Brook, 9 H. L. 193, **Lord Cromwell** said:

"There can be no doubt of the power of **every county to make laws regulating the marriage of its own subjects; to declare who may marry; how they shall marry, and the consequences of their marriage.**"

FOURTEENTH.

THE STATUTE IN QUESTION.

It will be observed, (1) that by its terms, the first

section of the statute is made to apply to every person, corporation or association of persons who shall maintain or operate any college, school or institution where persons of the white and the negro races are both received as pupils for instruction; (2), that by the second section, every teacher and instructor (white and colored) who shall teach in any such school, college or institution, where both races are received at the same time as pupils for instruction, are alike subject to its provisions; (3), that by the third section of the Statute, it is made to apply to every white person who attends any school or institution where negroes are received as pupils or receive instruction; and to every negro person who attends any school or institution where white persons are received as pupils or receive instruction; and by this section it is further provided:

> "That the provisions of this law shall not apply to any penal institution or house of reform."

We will refer to this proviso later.

Here the same rule is made to apply alike to both races, and the Statute gives to each race equal protection and imposes the same regulation on the white instructor as it does on the negro instructor; the same on the white pupil as on the negro pupil, and there is no discrimination whatever, unless the exemption of the penal institutions of the State and the house of reform from the provisions of the Statute, constitute a discrimination, within the meaning of the 14th Amendment.

By the proviso in the 3d section of the Statute, it does not apply to the inmates of the State penal institutions or the house of reform.

It was contended in the State Court by the distinguished counsel of the plaintiff in error, that this proviso constitutes a discrimination which rendered the Statute unconstitutional and void. The inmates of these institutions—white and colored—are outlawed. They are excluded from the benefit of the law, or by reason of their conduct they are deprived of its protection. They constitute a class to which the Statute does not apply. Such a classification was within the power of the State legislature, unless it was unreasonably and arbitrarily made. This question has substantially been passed upon in a number of cases.

In Magoun v. Bank, 170 U. S., 200, (42: 1042) Justice Kenna said:

> "That the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. * * * * * * * It does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

In Railroad Co., v. Mackay, 127 U. S., 205, (32: 107) Justice Field said:

> "But when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws,

if all persons brought under its influence are treated alike under the same conditions."

In Barbier v. Connelly, 113 U. S., 27, (28: 923) it was said:

"Class legislation discriminating against some and favoring others, is prohibited, **but legislation which in carrying out a public purpose, is limited in its application, if within the sphere of its operation, it affects alike all persons similarly situated, is not within the Amendment."**

FIFTEENTH.

NO RIGHT IS DENIED BY THE STATUTE.

The right to educate and to be educated is not interfered with. The teacher may teach either white or colored pupils; or he may teach both, if he separates his teachings. Any pupil, white or colored, may attend any school or institution in which his race is taught. Berea college may select its race and may continue its good work "in the even channel of its way;" or it may teach both races if it will establish separate schools.

THE STATUTE IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT.

This Statute neither denies the equal protection of the law, nor does it deprive any person of life, liberty or property without due process of law. Social equality is not guaranteed by the fourteenth amendment, nor is voluntary association guaranteed to the races.

This Statute applies with the same force to both white and colored races, providing that neither shall attend any school where the other is received as a pupil. It is claimed that because of this fact, the Act is obnoxious to the Fourteenth Amendment, securing the privileges and immunities to the citizens of the United States, and protecting them against the deprivation of life, liberty and property without due process of law. The liberty of attending school is not prohibited. It is the liberty of the white person to associate and attend a mixed school, or a school where negroes are taught, or of a colored person attending a school where white persons are taught that is prohibited. No person can claim that he is denied the right to acquire an education, because he or she is denied the right to be educated with persons of a different race.

No person, corporation or association of persons is denied the right to foster, promote, operate or maintain as many colleges or schools for the education of either race as he or it may desire; or if their generosity so permits them, for the education of both races, if separated. **The State by this Statute prohibits the voluntary co-education of the two races together, nothing more. Unless white pupils are guaranteed the right to voluntary associate with the pupils of the colored race, and vice versa, the act is not in conflict with, nor repugnant to the 14th Amendment.**

As in Cary v. Carter, 17 Am. Rep., 757:

> "By the **solemn decision** of that high court, **(the Supreme Court of the United States), the privileges and immunities belonging to the citizens of the states, as such, rest for their security and protection**

where they have heretofore rested, with the states themselves."

If this Statute secures substantially equal school advantages, which is a state and domestic affair, it is neither in conflict with the State nor Federal Constitution.

SIXTEENTH.

NO PROPERTY RIGHT IS INVADED.

Every regulation of a property right has been before the courts of the country in recent years for adjudication. **All property in the Commonwealth and every property right is held subject to those general regulations which are necessary to promote the common good and general welfare.**

The following authorities will illustrate the different phases in which this question has been presented to the courts.

Cooley's Constitutional Limitations, 7 Ed., 830.
Powers v. Commonwealth, 101 Ky., 287.
Dunn v. The Commonwealth, 88 Am. Rep., 344.
N. Y. N. H. & H. R. R. Co. v. N. Y., 165 U. S. 628, (41: 854).
Gladine v. Minnesota, 166 U. S., 427, (41: 1065).
Allgeyer v. Louisiana, 165 U. S., 578, (41:833).
Northern Sec. Co. v. U. S., 193 U. S., 196, (48: 679).
Otis v. Parker, 187 U. S., 66, (47: 323).
Holden v. Hardy, 169 U. S., 366, (42: 780).

In Allgeyer v. Louisiana, Supra, the Court said:

> **"The right to do business within a State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes."**

SEVENTEENTH.

FOURTEENTH AMENDMENT.

If the voluntary association of the white and the colored races is a privilege guaranteed and secured by the 14th Amendment of the Federal Constitution, then the constitutionality of the Statute may be in question, otherwise no federal question is presented on this appeal.

The 14th Amendment provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law."

This Amendment had for its purpose, (1), to secure so far as civil rights are concerned, absolute equality before the law; (2) to protect the civil rights of every one from encroachment by State authority.

It is the contention of the State, that the statute in question does not encroach on the civil rights of either race, nor does it discriminate against the civil rights of either. This Statute was intended to prevent these two streams of life from flowing into a common channel; to

preserve race identity and to maintain the purity of blood. It is the public policy of Kentucky to require the equal, but separate education of the two races; that while guaranteed equal civil rights, it is the policy of the State of Kentucky to maintain a separate social status.

How is the State to maintain a separate social status? If the young white and colored children are permitted to go voluntarily to school together; to sit together; to eat together; to recite together; to study together; to sleep together; to associate together and to become the guests of each other, may we ask what more is needed to constitute social equality? But let social equality be once established, and mutual attachment will follow as surely as the day does the night; first, among the weaker members of each race, and finally among all, resulting in the destruction or blotting out of the individuality and indentity of each race.

The laws of the State which now prohibit their intermarriage, if not repealed, would leave them to gratify their mutual passions of love in licentiousness. Or, is it reasonable to suppose that social equality may be established between the two races without intermarriage between the white and the colored races, where it is not prohibited by law? The associated education of the two races would lead to social equality, to intermarriage and to an amalgamation.

To guard the rights of the generations yet to be; to preserve the identity of the races, and to maintain the purity of blood, the Commonwealth of Kentucky in the exercise of her sovereign police power, enacted the Statute in question.

The General Assembly of Kentucky and this Honor-

able Court take notice of all facts, truths and matters which are so notorious, and universally known as to form a part of the common information of mankind.

It is shown by Dr. Sanford B. Hunt, Surgeon of United States Volunteers, in the Civil War, that (1). The standard weight of the negro brain is over five ounces less than that of the white. (2) Slight intermixture of white blood diminishes the negro brain from the normal standard, but when the infusion of white blood amounts to one-half (mulatto), it determines a positive increase in the negro brain, which in the quadroon is only three ounces below the standard. (3) The percentage of exceptionally small brains is largest among negroes having but a small proportion of white blood."

Dr. J. Barnard Davis in the Philosophical Transactions for 1868, at page 523, states that the average internal capacity of brain matter in the white race was 92.3 cubic inches, while that of the negro was 86.9, a deficit of nearly 7 per cent.

If we are right in our contention that intimate association in the school room will ultimately lead to social equality and amalgamation, who then will estimate the import of this "mental gap" between the white and the black?

This is not the result of education, but is innate and God-given; and therein lies the supremacy of the Anglo-Saxon-Caucasian race. Education, culture, refinement and civilization is the result of the polishing of the inborn and God-given faculty. Training, culture and education never produce faculty. All these are but the growth, the enlargement and expansion of an inborn capacity.

If the progress, advancement and civilization of the

20th century is to go forward, then it must be left, not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, but to the highest types and geniuses of that race. If this be not true, then Huxley, Darwin, Spencer, Haekel, Weismann, Mendel and Pearson "have labored in vain," and as an eminent writer has said:

> "If accepted science teaches anything at all, it teaches that the heights of being in civilized man have been reached along one path and only one—the path of selection, of the preservation of favored individuals and of favored races. * * * The hope of the human lies in the superhuman; and the possibility of the superhuman is given in selection, in natural and rational selection, among the children that are to be, of the parents of the men to come. The notion of social racial equality is thus to be seen to be abhorent alike to instinct and to reason; for it flies in the face of the process of the Suns; it runs counter to the methods of the minds of God. It is idle to talk of education and civilization and the like, as corrective or compensative agencies. All are weak and beggarly as over against the almightiness of heredity; the omnipotence of the transmitted germ plasma."

The historian and adventurer found the negro race, centuries ago, in barbarian darkness, and the race, as a whole, so remains, a warning and an admonition against social advancement and equality. While the Caucasian takes the white of the Italian marble and the negro the sableness of the night, yet color is not the result of individual choice or preferment; these are a few of the many reasons why the two races should not be educated

together, and the inevitable sequence of social equality avoided.

Feeling satisfied that this Statute deprives neither race of liberty, privelege, property or immunity; nor denies to either the equal protection of the law, and believing that it is for the welfare of both, the Commonwealth of Kentucky on behalf of its generations to come, claims and pleads the inherent sovereign right to require the white and the colored children within her jurisdiction to attend separate schools.

We ask that the judgment of the Kentucky Court of Appeals be affirmed, or the writ of error herein be dismissed.

JAMES BREATHITT,
Attorney-General.
N. B. HAYS,
For Defendant in Error.

THOS. B. McGREGOR,
CHARLES H. MORRIS,
of Counsel.

APPENDIX.

JUDGMENTS AND DECREES OF STATE COURTS ON WRIT OF ERROR.

United States Compiled Statutes 1901, section 709:

"A final judgment or decree in any court in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State Court, and may, at their discretion, award execution. or remand the same to the court from which it was removed by the writ."

"AN ACT TO PROHIBIT WHITE AND COLORED PERSONS FROM ATTENDING THE SAME SCHOOL.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined one thousand dollars, and any person or corporation who may be convicted of violating the provisions of this act, shall be fined one hundred dollars for each day they may operate said school, college or institution, after such conviction.

"Sec. 2. That any instructor who shall teach in any school, college or institution where members of said two races are received as pupils for instruction shall be guilty of operating and maintaining same and be fined as provided in the first section hereof.

"Sec. 3. It shall be unlawful for any white person to attend any school or institution where negroes are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined fifty dollars for each day he attends such institution or school: Provided, That the provisions of

this law shall not apply to any penal institution or house of reform.

"Sec. 4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color.

"Sec. 5. This act shall not take effect, or be in operation, before the fifteenth day of July, one thousand nine hundred and four."

Approved March 22,1904
Acts 1904, Chap., 85 Page 181.

BEREA COLLEGE V. COMMONWEALTH.

(Filed June 12, 1906).

29 K. L. R. 284.

Under an act of the Kentucky Legislature, approved March 22, 1904, entitled "An act to prohibit white and colored persons from attending the same school," making it unlawful for "any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school or institution shall be fined $1,000, and any person or corporation who may be convicted of violating the provision of this act shall be fined $100 for each day they may operate said school, college or institution after such conviction," and by section 4, providing that "nothing in this act shall be construed to prevent any private school, college or institution from maintaining a separate and distinct branch thereof in a different

locality not less than twenty-five miles distant, for the education, exclusively, of one race or color." Berea College was indicted in Madison county for "operating a school for white and negro pupils in violation of said act," and in a second indictment was charged with the offense of "maintaining and operating a college, school and institution of learning, where persons of the white and negro races are both received, and within a distance of twenty-five miles of each other, as pupils for instruction," in both of which indictments, which were tried together the defendant, Berea College, was found guilty and has appealed. Held—

First. The act is within the legitimate exercise of the police power of the State, provided it is not so unreasonable in its provisions as to be oppressive and obnoxious to the limitations of the power, the intention of the act being to prevent the two races from attending the same school at the same place and at the same time, whereby there would result an intermingling or close personal association between them, so that a clashing of race prejudices or race destruction may be lawfully averted.

Second. Section 4, of the statute makes it a misdemeanor not only to teach pupils of the two races in branches of the same institution, even though one race exclusively is taught in one branch and the other in another branch, provided the two branches are within twenty-five miles of each other. Without this section the teaching of the two races in the same school, at the same time and place is prohibited. But if the same school taught the different races at different times, though at the same place, or at different places at the same time, it would not be unlawful. A teaching in different rooms

of the same building, or in different buildings so near to each other as to be practically one, would violate the statute.

Third. Section 4, violates the limitations upon the police power. It is unreasonable and oppressive. The object of the statute is not to prevent either race from being taught by an institution which also teaches the other. Nor is it to prevent persons of one race from teaching persons of the other or employing their means for that purpose. The State itself teaches both races, but in separate schools. Section 4 can be ignored and the remainder of the act is complete notwithstanding.

Fourth. The act is not in violation of the fourteenth amendment of the Federal Constitution, which guarantees the equal protection of the laws to all citizens of the United States, and prohibits any State from depriving any citizen of the United States of his property, life or liberty without due process of law.

The act applies equally to all citizens and makes no discrimination against those of either race. The right to teach white and negro children in a private school at the same time and place is not a property right. Appellant, as a corporation created by this State, has no natural right to teach at all. Its right to teach is such as the State sees fit to give it. The State may withhold it altogether or qualify it.

Fifth. The judgment in the first indictment is affirmed and that under the fourth section of the act is reversed, with directions to dismiss the indictment.

John G. Carlisle, C. F. Burman and Guy Ward Mallon for appellant.

N. B. Hays and Chas. H. Morris for appellee.

Appeal from Madison Circuit Court.

Opinion of the Court by Judge O'Rear.

There were two indictments against appellant in the Madison Circuit Court, for alleged infractions of an act of the legislature, approved March 22, 1904, entitled "An act to prohibit white and colored persons from attending the same school." The first indictment, which was numbered 6009 on the Circuit Court calendar, charged appellant with operating a school for white and negroes in violation of the act. The second indictment, numbered 6045, charges appellant with the offense of "maintaining and operating a college, school and institution of learning where persons of the white and negro races are both received, and within a distance of twenty-five miles of each other, as pupils for instruction."

The act alluded to, the title to which has been given above, is in the following words:

"Section 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined $1,000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined $100 for each day they may operate said school, college or institution after such conviction.

Section 2. That any instructor who shall teach in any school, college or institution where members of said two races are received as pupils for instruction, shall be guilty of operating and maintaining same, and fined as provided in the first section hereof.

"Section 3. It shall be unlawful for any white person to attend any school or institution where negroes

are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined $50 for each day he attends such institution or school: Provided, That the provisions of this law shall not apply to any penal institution or house of reform.

"Section 4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color.

"Section 5. This act shall not take effect, or be in operation, before the 15th day of July, 1904." (Acts 1904, chapter 85, page 181).

Appellant was found guilty and fined $1,000 in each case. These appeals involve the constitutionality of the Statute. The cases are heard and disposed of together.

Appellant, Berea College, is a private non-sectarian school. It was founded some fifty years ago, for the purpose, it is said, "of promoting the cause of Christ," and to give general and non-sectarian religious instruction to "all youth of good moral character." With a large endowment, extensive buildings and grounds and educational paraphernalia, it had for nearly fifty years before the act in question maintained a school at Berea, in Madison county, this State, presumably upon substantially the same basis as it was doing when the statute was enacted, and the indictments in these cases returned.

The circuit court sustained the constitutionality of the act in every particular. Appellant assails its consti-

tutionality upon the ground that it violates the Bill of Rights embraced in the Constitution of this State, as well as that it is in conflct with the fourteenth amendment to the Constitution of the United States.

It is claimed that the act is repugnant to the Bill of Rights, in that it violates the following, which are guaranties to every citizen:

First. The right of enjoying and defending their liberty.

Second. The right of worshiping Almighty God according to the dictates of their own consciences.

Third. The right of seeking and pursuing their safety and happiness.

Fourth. The right of freely communicating their thoughts and opinions.

Fifth. The right of acquiring and protecting property

Sixth. That every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

The 26th section of the Bill of Rights concludes: "To guard against transgression of the high powers which we have delegated, we declare that everything in this bill of rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

Appellant's contention is: "This act violates the letter or spirit of every one of the provisions referred to. It destroys the rights of the teachers and pupils of Berea College to enjoy their liberties and the right of seeking and pursuing their safety and happiness. It denies the right to worship God according to the dictates of their

own consciences by attending and participating in non-sectarian religious exercises in a school or institution of their own choice. It denies to the trustees, the teachers, and all others connected with the institution, the right to freely communicate their thoughts and opinions, and it denies to the institution itself and to its assistants and employes of every grade the right of acquiring and protecting property, and the right to follow their usual and innocent occupations."

We understand appellant's argument to reach to the conclusion that the exercise of police power by the State is prohibited concerning the subjects enumerated in the bill of rights, at least it is beneath those rights, and must be exercised so as not to conflict with them.

No jurist has dared to attempt to state the limit in law of that quality in government which is exercised through what is termed the police power. All agree that it would be inadvisable to attempt it. Yet very broadly and indefinitely speaking, it is the power and obligation of government to secure and promote the general welfare, comfort and convenience of the citizens, as well as the public peace, the public health, the public morals, and the public safety. (Cooley's Const. Limitations, 704; Tiedeman's Limitations of Police Power, 212; I Hare's American Constitutional Law, 766). It is not inaptly regarded in some of its most important features as the right of self-protection in government, the right of self-preservation in society. It inheres in every State, is fundamental in the existence of every independent government, enabling it to conserve the well-being of society, and prohibit all things hurtful to its comfort or inimical to its existence. In view of these definitions of the principle, unsatisfactory as they must be conceded to be, it is ap-

parent that even those things reserved by the people in the Bill of Rights from the powers delegated to their magistrates are impliedly subject also to this power to preserve the State. It has always been so regarded, except wherein its exercise in a particular manner or of a particular thing is expressly excluded, or necessarily so by the language used. It would be more tedious than difficult to enumerate instances. But some of those most readily occurring to the mind which are held subject to this power, are, that life and liberty, either or both, may be forfeited by the citizen under laws enacted under it. The right of worshiping Almighty God according to the dictates of our own conscience—probably the first great moving cause of our early colonial civilization—yields to the proper exercise of this power. For example, the practices of polygamy, so inimical to the well-being of society, though deemed a religious rite, must yield to the police power of the State. If it were held here by some, as it is in some countries, a religious duty that mothers should worship God by sacrificing their babes, throwing them into the rivers to appease His supposed wrath, it would not be tolerated by the State, however conscientious the votary of the right. The pursuit of happiness in any useful and innocent employment, or the free movement of one's person, even when done under considerations of his own safety, are subject to this same power. The most familar instance probably is the application of quarantine and health laws. Yet this power itself fortunately has its limitations.

To be exercised exclusively within the discretion of the political branch of government, it must have a just and real relation to one of the ends for which that power may be lawfully employed. Mere declaration that the

proposed exercise is in behalf of such end is not enough. The action must be cognate to one of the subjects to which the power properly pertains. The duty is upon the courts upon a proper application, to declare void an attempted exercise of such power, which is not fairly and reasonably related to a proper end. Thus balanced, there is little danger that oppression can result from its arbitrary employment. The good sense and the honest judgment of each generation must after all furnish the real limit to the police power of government. For each age must judge, and will judge, of what is hurtful to its welfare, of what endangers the existence of society, of what threatens to destroy the race of people who are applying this primal law of self-protection to their own case.

Because of the undefined extent of its overpowering quality, of its unmeasurable value, of the great danger of oppression under its guise, and of its abuse by those intolerant of the restraints of law, any new application of the police power of government is regarded with closest scrutiny, not unmixed with apprehension. It can be abused, to the hurt of the people. It can be neglected to the hurt of the State.

The application of it by the statute above quoted, is new. It has never before been so applied so far as we are certainly aware. The question is, is it a fair exercise of the police power to prohibit the teaching of the white and negro races together? Is it a fair exercise of the power to restrain the two races from voluntarily associating together in a private school, to acquire a scholastic education?

The mingling of the blood of the white and negro races by inter-breeding is deemed by the political de-

partment of our State government, as being hurtful to the welfare of society. Marriage by members of the one race with those of the other is prohibited by statute. (Section 2097, 2098, 2111, 2141, Kentucky Statutes.) It is admitted freely in argument that the subject of marriage is one of the very first importance to society; that it may be regulated by law even as among members of the same race. Inbreeding is known to lower the mental and physical vigor of the off-spring. So incestuous marriages are prohibited. Others not incestuous, but involving the probable effect upon the vitality of the offspring are prohibited also, and marriage by idiots. Still other inhibitions, such as age, and so forth, are imposed, all of which look to the well being of the future generations. No one questions the validity of such statutes, enacted as they confessedly are, under the police power of the State. Upon the same considerations this same power has been exercised to prohibit the intermarriage of the two races. The result of such marriage would be to destroy the purity of blood and identity of each. It would detract from whatever characteristic force pertained to either. Such statutes have been upheld in the following cases; Exparte Hobbs, 1 Woods, 537; State v. Gibson, 36 Ind., 402; State v. Jackson, 80 Mo., 177; State v. Hariston, 63 N. C., 453; Brook v. Brook, 9 H. L., 193; Green v. State, 58 Ala., 190; 29 Am. Rep.; Lonas v. State, 3 Heisk (Tenn.) 309.

Another exercise of the police power with respect to the separation of the two races, which has been upheld, is the requiring them to use separate coaches in traveling upon railroads, as adopted by certain of the States. These statutes, and regulations of a similar kind, even without statute, have been upheld wherever their validity has

been questioned. The opinions in the following cases show the unanimity of holding and reasoning on this subject; West Chester & Phil. R. R. Co. v. Mills, 55 Pennsylvania State, 209, 93 Am. Dec., 747; Smith v. State, 100 Tenn., 494; L. N. O. & T. R. R. Co. v. Mississippi, 133 U. S. 587; Plessy v. Ferugson, 163 U. S., 537; C. & O. Ry. Co. v. Kentucky, 179 U. S., 392.

We have such statute in Kentucky; section 795, Kentucky Statutes. The validity of this statute has been upheld by this court in L. & N. R. R. Co. v. Commonwealth, 99 Ky., 663; Quinn v. L. & N. R. R. Co., 98 Ky., 231; Wood v. L. & N. R. R. Co., 19 Ky. Law Rep., 924; 101 Ky., 703; Ohio Valley R. R. Co. v. Lander, 104 Ky., 431; C. & O. Ry. Co. v. Commonwealth, 21 Ky. Law Rep., 228.

In the provisions for public education made by the government of the United States for the District of Columbia, and by many of the States, a separation of the races is enforced by requiring separate schools to be provided for each, and prohibiting members of either race from attending the school provided for the other. In every instance in which the question has arisen as to the validity of such legislation, it has been upheld as a valid exercise of its police power by the State. (Section 16 and 17, chapter 156, U. S. Statutes at Large; section 187, Constitution of Kentucky; section 4428, Kentucky Statutes; Lehew v. Brummell, 103 Mo., 551; Corey v. Carter, 48 Ind., 362; Martin v. Board of Education, 42 W. Va., 515; State of Ohio v. McCann, 21 Ohio; Cisco v. School Board, 161 N. Y., 598; Bertonneau v. Board of Directors, 3 Woods, 180.)

Distinguished counsel for appellant, while conceding the correctness of the application of the principle being

discussed to public schools and common carriers, seek to distinguish that application from the one contended for by the State in the case at bar upon the ground that in the cases of common schools and railroad travel the State was merely preventing an enforced association by the two races, whereas under the statute now being considered the power is attempted to be extended so as to prevent the voluntary association by the two races.

We can not agree that the ground of distinction noted could form a proper demarkation between the point where the power might be exercised, and the one where it might not be. The thing aimed at by all this legislation was not that of volition. It was not until recently that attendance upon common or public schools was compulsory. It has nearly always been voluntary. All this legislation was aimed at something deeper and more important than the matter of choice. Indeed, if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was at all a permissible subject for the exercise of the police power.

The separation of the human family into races, distinguished no less by color than by temperament and other qualities, is as certain as anything in nature. Those of us who believe that all of this was divinely ordered have no doubt that there was wisdom in the provision, albeit we are unable to say, with assurance, why it is so. Those who see in it only nature's work, must also concede that in this order, as in all others in nature, there is an unerring justification. There exists in each race a homogenesis by which it will perpetually reproduce itself, if unadulterated. Its instinct is gregarious. As a check there is another, an anitpathy to other races,

which some call race prejudice. This is nature's guard to prevent amalgamation of the races. A disregard of this antipathy to the point of mating between the races is unnatural, and begets a resentment in the normal mind. It is incompatible to the continued being of the races, and is repugnant to their instincts. So such mating is universally regarded with disfavor. In the lower animals this quality may be more effective in the preservation of distinct breeds. But among men conventional decrees in the form of governmental prescripts are resorted to in aid of right conduct to preserve the purity of blood. No higher welfare of society can be thought of than the preservation of the best qualities of manhood of all its races. If then it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross-breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breach of the main desideratum, the purity of racial blood. In less civilized society the stronger would probably annihilate the weaker race. Humane civilization is endeavoring to fulfill nature's edicts as to the preservation of race identity in a different way. Instead of one exterminating the other, it is attempted to so regulate their necessary intercourse as to preserve each in its integrity.

The maxims of liberty and the pursuit of happiness which are familiar to the common law, wherefrom the idea found in our bill of rights is probably borrowed, are the principles worked out by the Anglo-Saxon race for its own government. In no other country has it ever been attempted before, at least on so important a scale, to apply such principles alike to so many different races, types and creeds of men. The experiment is great in its

importance. It forms now one of the biggest questions being worked out by this great North American republic. That much bitterness has appeared, and some oppression has been practiced, are among the inevitable attendants upon the adjustment by people of different races of the rights justly belonging to each. Clashing of antipathies resulting in outbreaks of violence tends to disturb the public peace; threatens the public safety, and so disrupts the serenity of common purpose to promote the welfare of all the people, that the question is become one of the first importance to the section where the two races live in the greatest numbers. That it is well within the police power of government to legislate upon this question so as to repress such outbreaks and to prevent disturbances of the public tranquility, we have no sort of doubt. The seriousness of the situation is not new. Even before the abolition of slavery it was keenly and intelligently anticipated. Since the emancipation of the negro it has not been the least of the grave problems of government which have been presented to some of the States for solution. As the outcome of discussion, of agitation, of too frequent conflicts, of violent turbulence that set even the law at defiance in some localities and in times of great popular excitement, this species of legislation has been evolved as tending to a solution of the trouble by removing as far as possible its cause. Is not this situation one, if ever there was one, which calls for and amply justifies the exercise of police power of the government? Or should this irritating cause be left without restraint or control, till by the exhaustion of one side or the other it is settled by the sheer force of superiority of numbers or physicial power? It is idle to talk of controlling ideas by legislation, or even by

force. You can not bind an idea by a statute. The attempt should be made, and we believe is being made, in good faith to so control this situation through the law that neither race can have just cause for complaint; so that each may have every lawful privilege and right that the other has; so that equality of rights before the law shall be a fact, as well as a high-sounding theory, yet so as to conserve the very best of the characteristics of each race, to develop its ideas of morality, its thrift, independence and usefulness. Observation and study at close hand of both the theory and practical working of this problem of social existence, of the colaboration of two races so different as the white and black in the same State upon a plane of legal equality, where the government is by the people for the people, it has been found, so the legislative department declares, as evinced by the public policy indicated by the statutes discussed in this opinion, that at the very bottom of all the trouble is the racial antipathy to the destruction of its own identity; and that if that danger is removed, the friction practically disappears. A separation of the races under certain conditions is, therefore, enforced, where it is believed that their mingling would tend to produce the very condition which is found to lie at the base of the trouble. In its application it becomes all the more necessary that the overmastering principles included in the police power of the government be firmly recognized, so that a clashing of race prejudices, or race destruction may be lawfully averted.

Counsel resort to conjecture concerning other legislation of this character which they fear might follow that now involved. It is suggested that the State might attempt to regulate, under the same power, the right

of the races to work together in the same field or factories, or to mingle together at all. A sufficient present answer to this is that each proposed application of the power is to be determined upon the circumstances under which it is sought to be applied. If it is arbitrary, unreasonable or oppressive, it will be denied. Nor is it a legitimate argument to prove a negation of power by showing wherein it may be abused. If it be conceded, as we think the fact is, that the ultimate object of this legislation providing separate schools for the two races was to separate the youth of each during the most impressible and least responsible period of their lives, and until ripened judgment and observation can have set them well in the safe ways of thinking, much of the dangers of the shame and distress which errors of immaturity might entail would be avoided. The legislation above enumerated is all of a kind. It has two great objects—one, the preservation of the identity and purity of the races; the other, the avoidance of clashes between the races by preventing their most fruitful sources.

In upholding this character of legislation in a separate coach regulation the Supreme Court of Pennsylvania, in West Chester, etc., R. R. Co. v. Miles, 23 Am. Dec., 747, thus stated the principal thought: "The danger to the peace engendered by the feeling of aversion between individuals of the different races can not be denied. It is the fact with which the company must deal. If a negro takes his seat beside a white man or his wife or daughter, the law cannot repress the anger or conquer the feeling of aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by

separation, than to punish afterwards, the breach of the peace it may have caused. * * * The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this State resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority, or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to his creatures when He intends that they shall not overstep the natural boundaries he has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not

to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical consequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

Appellant's counsel construe this opinion as supporting their theory that the power being discussed may be exercised only where it forbids the enforced association of the races. While such enforced association is more easily distinguished as falling within the power yet the main idea is that such association at all, under certain conditions leads to the main evil, which is, amalgamation of the races, and incidentally to conflicts between their members naturally engendered by too close personal contact under conditions which are bound to excite prejudices and race animosities. If such evil falls within the police power to prevent, then whatever naturally contributes to them, may also be regulated, provided the regulation is itself reasonable. The act in question is within the legitimate exercise of the police power of the State, provided it is not so unreasonable in its pro-

visions as to be oppressive and obnoxious to the limitations of the power. It is argued for appellant that the act quoted makes it a misdemeanor to teach white and negro pupils in the same institution anywhere in the State (but for the proviso contained in the fourth section of the act), although there might not be a mingling of the races at all. This would be out of harmony with the spirit of the law. It would be an unreasonable and unwarranted interference indeed with the citizen's right to teach, and the pupils to be taught. Under the rule in the construction of a statute to resolve any ambiguity in its language in favor of that meaning which is not repugnant to the Constitution, if the language admits of more than one construction, we have no doubt that the intention of this act was to prevent the two races from attending the same school at the same place and the same time, whereby there would result an interminglin or close personal association between them. Such is the fair, reasonable meaning of the whole act, including title and context.

Section 4 of the statute makes it a misdemeanor not only to teach pupils of the two races in branches of the same institution, even though one race exculsively is taught in one branch, and the other in another branch, provided the two branches are not within twenty-five of each other. This section is added as a proviso to the previous sections. Without this section as we construe the act, the teaching of the two races in the same school at the same time and place, is prohibited. But if the same school taught at different places at the same time, it would not be unlawful. It evidently was thought that the effect of the statute might be nullified by teaching the two races in the same school at the same time and

place in fact, but perhaps in different rooms of the same building, or in different buildings of the same college plant, constituting to all intents one building. A teaching in different rooms of the same building, or in different buildings so near to each other as to be practically one, would violate the statute. As it was such intimate personal association of the pupils that was being prohibited. It was attempted by the fourth section to make this impossible, by prohibiting such teaching in branches of the same school if done within twenty-five miles of each other. This last section we think violates the limitations upon the police power; it is unreasonable and oppressive. We must look to the object of the legislation as well as to the words of the statute to divine the true meaning. It is not to prevent either race from being taught by an institution which also teaches the other. Nor is it to prevent persons of one race from teaching persons of the other, or employing their means for that purpose. The State itself teaches both races, but in separate schools. They are both taught within twenty-five miles of each other, and within very short distances of each other. But this section can be ignored and the remainder of the act is complete notwithstanding.

The remaining question is whether the act as construed by this court violates the fourteenth amendment to the Constitution of the United States. That amendment guarantees the equal protection of the laws to all citizens of the United States, and prohibits any State from depriving any citizen of the United States of his property, life or liberty without due process of law. The act involved, applies equally to all citizens. It makes no discrimination against those of either race.

The right to teach white and negro children in a pri

vate school at the same time and place is not a property right. Besides, appellant as a corporation created by this State, has no natural right to teach at all. Its right to teach is such as the State sees fit to give to it. The State may withhold it altogether, or qualify it. (Allgeyer v. Louisiana, 165 U. S., 578.) We do not think the act is in conflict with the Federal Constitution.

Wherefore, we conclude that the judgment in case 6009 should be affirmed; and that the judgment in case 6045 should be reversed, and be remanded, with directions to dismiss that indictment.

The whole court sitting, except Cantril, Judge, absent. Judge Barker dissents, except in case 6045."

PUBLIC POLICY OF KENTUCKY.

It is the public policy of the Commonwealth of Kentucky to preserve the identity of each race; maintain the purity of its blood; to prevent an amalgamation, and as a means to this end, the statute in question was adopted This will be seen from the following constitutional and statutory provisions:

Constitution, Sec. 187:

> "In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."

Kentucky Statutes, Sec. 4428:

> "In order that all districts may, as soon as practicable, be made to contain not less than forty-five

pupil children, each county superintendent shall, from year to year, as far as practicable, and in accordance with the best educational results, equalize in school population the districts of his county. No district hereafter established shall include less than forty-five pupil children, except in cases of extreme emergency. No district shall include more than one hundred pupils children unless it contains a city, town or village within its limits, or there be established therein a high school, academy or college entitled to a share of the revenue of the common school fund, by virtue of a special charter or of a contract between the trustees of the common school district and the trustees or other legal authorities of such institution. In all such cases the teacher or teachers of such high school, academy or college having charge of the commo' school pupils shall hold certificates, and be subject to all the provisions of the common school laws. Such contracts shall expressly provide that all children of pupil age residing within the district shall have the privilege of attending the said high school, academy or college for at least five months during the school year without payment of the tuition fees; but nothing in this chapter shall be construed to authorize any white person to attend a common school or other institution of learning established for colored children, or any colored person to attend a common school or other institution of learning established for white children. In all cases where the number of children shall exceed one hundred, or fall below forty-five, the county superintendent shall report the reason thereof to the Superintendent of Public Instruction. The area of

no school district shall be more than sixteen square miles, unless it is necessary to enlarge the same so as to include the minimum number of children. Each schoolhouse hereafter erected shall be located as near the center of the district as practicable."

Kentucky Statutes, Sec. 2111:

"If any authorized person shall knowingly, with or without license, solemnize a marriage such as is herein prohibited, he shall be imprisoned not less than one nor more than twelve months, or fined not exceeding one thousand dollars, or both."

Kentucky Statutes, Sec. 2114:

"Any party to a marriage within the incestuous degree herein prohibited, or between a white person and a negro or mulatto, shall be fined not less than five hundred dollars nor more than five thousand dollars, and if, after conviction, the parties continue to cohabit as man and wife, they, or either of them, shall be imprisoned not less than three nor more than twelve months in the penitentiary."

Kentucky Statutes, Sec. 2097:

"Marriage is prohibited and declared void:

1. With an idiot or lunatic.

2. Between a white person and a negro or mulatto.

3. Where there is a husband or wife living, from whom the person marrying has not been divorced.

4. When not solemnized or contracted in the presence of an authorized person or society.

5. When, at the time of marriage, the male is under fourteen, or the female is under twelve years of age."

Kentucky Statutes, Sec. 2098:

"The issue of an illegal or void marriage shall be legitimate, except that the issue of an incestuous marriage, found such by the conviction or judgment of a court, in the lifetime of the parties, or of a marriage between a white person and a negro or mulatto, shall not be legitimate; and where one of the parties is an idiot or lunatic, the issue shall be legitimate as to both."

Kentucky Statutes, Sec. 795, in part provides:

"Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches by steam or otherwise, on any railroad lines or tracks within this State and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish

separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart."

SUPPLEMENT TO REVISED STATUTES OF KENTUCKY, PAGE 738.

Act of February 16, 1866.

AN ACT FOR THE BENEFIT OF THE NEGROES AND MULATTOES IN THIS COMMONWEALTH.

Sec. 1. That all the taxes hereafter collected from negroes and mulattoes in this Commonwealth, shall be set apart and constitute a separate fund for their use and benefit, one half, if necessary, to go to the support of their paupers, and the remainder to the education of their children.

Sec. II. In addition to the tax already levied by the laws of this Commonwealth, a tax of two dollars shall be levied on every male negro and mulatto over the age of eighteen years, to be assessed and collected as other taxes, and, when paid into the treasury, shall go into the fund aforesaid.

Sec. III. The commissioners of taxes in each county shall keep a separate book, or a separate column in his

book, for the enlistment of the taxable property of negroes and mulattoes, and in which the names of all the male negroes and mulattoes over the age of eighteen shall be recorded.

Sec. IV. The trustees of each school district in this Commonwealth may cause a separate school to be taught in their district for the education of the negro and mulatto children in said district, to be conducted and reported as other schools are, upon which they shall receive their proportion of the fund set apart in this act for that purpose.

Sec. V. The county court of each county may certify to the auditor of public accounts the number of negro and mulatto paupers kept in each county, and upon such certificate draw their proportion of the fund set apart in this act for that purpose. Said reports shall be made by said courts at their annual court of claims.

Sec. VI. Chapter eighty-eight of the Revised Statutes, and amendments thereto, shall regulate the mode and manner of distributing the school fund realized under this act; but no part of said fund shall ever be drawn or appropriated otherwise than pursuant to this act in aid of common schools for negroes and mulattoes.

Sec. VII. The auditor shall apportion each year the revenue from the fund realized under this act for the benefit of said paupers among the several counties of the state according to the number of said paupers in each county, as shown by the reports of the several county courts.

Sec. VIII. Nothing in this act shall be construed as interfering with the rights of the county courts in levying county taxes.

Sec. IX. This act shall take effect from its passage.

GENERAL STATUTES, FEBRUARY 23, 1874.

Page 875.

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF COMMON SCHOOLS FOR THE COLORED CHILDREN OF THIS COMMONWEALTH.

§ 1. **Be it enacted by the General Assembly of the Commonwealth of Kentucky,** That there shall be a uniform system of common schools for the education of the colored children of this Commonwealth.

§ 2. That the school fund for this purpose shall be known as the colored school fund, and shall consist of the following provisions, viz.:

1. The present annual revenue tax of twenty-five cents, and twenty cents in addition, on each one hundred dollars in value of the taxable property owned or held by colored persons, which tax shall be devoted to no other purpose whatever.

2. A capitation tax of one dollar on each male colored person above the age of twenty-one years.

3. All taxes levied and collected on dogs owned or kept by colored persons.

4. All State taxes on deeds, suits, or on any license, collected from colored persons.

5. All the fines, penalties, and forfeitures imposed upon and collected from colored persons due the State, except the amount thereof allowed by law to attorneys for the Commonwealth.

6. All sums of money hereafter received by this

Commonwealth under or by virtue of an act of the Congress of the United States Distributing public lands, or the proceeds of the sales thereof: Provided, The pro rata share to each colored pupil child shall not exceed, in any one year, the apportionment made to each white pupil child of this Commonwealth.

7. All sums arising from any donation, gift, grant, or devise, by any person whatsoever, wherein the intent is expressed that the same is designed to aid in the education of the colored children of this Commonwealth, or of any county or school district therein.

§ 3. The revenue arising annually from the resources provided by this act shall constitute the sum to be distributed each year, by the Superintendent of Public Instruction, as now provided by the common school law. It shall be the duty of all clerks or judges of courts wherein such fines, penalties, and forfeitures, or taxes on deeds, suits, and licenses are imposed, to collect and pay the same into the Treasury, by the first day of January in each year, deducting five per cent. thereof for collection.

§ 4. The assessor of each county shall keep a separate column in his book showing the enlistment of capitation and taxable property of all colored persons therein subject to taxation by the provisions of this act.

§ 5. The sheriff of each county, shall be allowed five per cent. of the taxes collected and paid into the Treasury by him for the colored school fund.

§ 6. The sheriff shall appropriate the taxes, or any part thereof, collected from any colored person, to whatever fund said colored person may designate, in all cases where he is not able to pay the entire taxes assessed against him for State, county, school and municipal purposes.

§ 7. The Auditor shall keep a separate account for the colored school fund, which shall constitute a basis for the Superintendent's annual pro rata distribution to the colored children of this Commonwealth.

§ 8. That the number of colored children in each district, between the ages of six and sixteen years, shall be taken and reported at the same time and in the same manner as required by law for taking the census of white children; and the distribution of the colored school fund shall be made at the same time in the same manner as provided by law for the distribution of the school fund for white children.

§ 9. The county school commissioner shall be responsible, on his official bond, for the proper distribution of whatever portion of the colored school fund may come into his possession, and for his compensation shall receive three dollars for each colored common school taught in his county, and vested while in session, and one per cent. on all moneys disbursed by him in the support of the colored common schools of his county.

§ 10. The commissioner shall lay off the county into suitable districts, most convenient to the greatest number of colored children in each county, so that no district shall contain more than one hundred nor less than twenty colored children of pupil age.

§ 11. In counties where there are not a sufficient number of colored children to form various schools, a single school may be organized and taught in the locality where the greatest number of colored children reside, and all the colored children of pupil age in the county shall have the privilege of attending said school.

§ 12. That the commissioner, at the beginning of each school year, shall appoint three colored school trus-

tees to each colored school district. These trustees shall have the management of the colored school of their district, employ a teacher therein, and shall notify the parents of the colored children in the district that it is their privilege to send their children to said school free of charge. They shall also report to the commissioner the length of time said school was taught by a qualified teacher, not less than three months in each year, except where there are not more than sixty colored children in a district, then the school may be taught for two months, with the consent of the commissioner. Appeals from the decision of the trustees, upon the petition of any dissatisfied colored person in the district, may be taken to the county commissioner, whose decision in the case shall be final.

§ 13. That the trustees of each district may obtain a site for a school house, and erect a house thereon, by purchase, gift, devise, or donation, and hold and preserve the same for the use and benefit of said school district.

§ 14. That applicants to teach the schools provided for in this act shall obtain certificates in the same manner as now provided by law for applicants to teach white schools, except that the examination may not be extended beyond spelling, reading, writing, and common arithmetic; and a school taught by a teacher competent to teach these branches shall be a lawful school.

§ 15. That the superintendent, commissioners, and trustees may receive gifts, donations, and devises for the benefit of colored schools in the State, a particular county or district respectively, and shall hold and use the same as requested by donor or devisor.

§ 16. That it shall be unlawful for any colored child

to attend a common school provided for white children, or for a white child to attend a common school provided for colored children.

§ 17. The teacher of each colored common school shall teach at least six hours each day, keep a register of the school, and within ten days after the close of the session report to the commissioner the highest, lowest, and average number of pupils in attendance during the session.

§ 18. No school-house erected for a colored school shall be located nearer than one mile of a school-house erected for white children, except in cities and towns, where it shall not be nearer than six hundred feet.

§ 19. The Superintendent of Public Instruction shall provide and furnish the commissioner of each county with the necessary blanks, and perform all other duties similar to those he performs for the white children under the common school law. He shall be allowed a clerk, who shall be paid a salary of seven hundred dollars a year to assist him in his duties pertaining to colored common schools; and said salary and all other expenses incident to a proper conduct of the colored common school system shall be paid out of the colored school fund.

§ 20. The colored school officers and teachers may organize for themselves a State association and auxilliary county institutes, under similar provisions to those made for the officers and teachers of white schools in chapter eighteen (18) of the General Statutes.

§ 21. The State Board of Education shall prescribe a course of study and adopt rules for the government of the colored common schools.

§ 22. That all the provisions of chapter eighteen (18) of the General Statutes which may be deemed nec-

essary for the government of colored common schools, not in conflict with this act, shall apply to the same, which shall be determined by the State Board of Education; and when said board shall have determined upon the provisions of said chapter essential to the government of colored common schools, and adopted such text-books and regulations as it may deem proper for the interest of said schools, the Superintendent of Public Instruction shall compile and publish them, and shall furnish to the commissioner of each county a sufficient number for the use of the colored school trustees of the same.

§ 23. That all unexpended surplus remaining over at the expiration of the school year shall be returned to the Treasury, and shall be distributed by the Superintendent the ensuing year: Provided, Any portion of it that may not be necessary to make the per capita equal to that of a white pupil child may be invested, by the State Board of Education, for the benefit of colored schools in this Commonwealth, the interest upon which shall be annually distributed.

§ 24. That all laws and parts of laws in conflict with this act are hereby repealed.

§ 25. That this act shall take effect from its passage.

KENTUCKY STATUTES, ARTICLE XVI. PAGE 1588.

(Act of May 22, 1893.)

COLORED PERSONS—NORMAL SCHOOL FOR.

§4527. **Trustees — Appointment — Term of Office — Powers — Vacancies — Treasurer.** The State Normal School for Colored Persons (see sec. 4527a), established

by an act of the General Assembly approved May eighteenth, one thousand eight hundred and eighty-six, shall hereafter be under the control and supervision of a board of trustees, composed of the Superintendent of Public Instruction, who shall be ex-officio chairman of the board, and three intelligent and discreet person, residents of Franklin county, to be appointed by the Governor, subject to the approval of the Senate, who are hereby constituted a body corporate, with power to sue and be sued, plead and be impleaded, and to hold in trust all funds and property now owned by said school, or which may hereafter be provided for it, and shall be known and designated as "The Board of Trustees of the Kentucky State Normal School for Colored Persons." (see sec. 4527a.) The term of office of the three members appointed by the Governor shall begin on the first day of July, one thousand eight hundred and ninety-three, and one member thereof shall retire, as may be determined by lot, at the end of one year thereafter, one in two years, and the other in three years; their successors shall be appointed by the Governor for a term of three years; they shall be subject to removal by the Governor for cause, and he is authorized to fill all vacancies occurring by death, resignation or otherwise. Said board shall adopt such rules for the government of said school, not inconsistent with law, as they deem proper, and shall supervise all its interests, provide for all its wants, confer weekly with the faculty and require formal reports of the actual condition of the school in every regard. They shall, biennially, beginning on the first day of July, 1893, elect some suitable person outside of their own number as treasurer, who before entering on his duty, shall give bond in such a sum as they may prescribe, and they shall

agree with him as to compensation: Provided, That in no case shall such compensation exceed one hundred dollars per annum. (Appropriations for school, see secs. 4534, 4591 a.)

§ 4527-A. **Name of School—President and Powers—Superintendent.** That the name of the State Normal School for Colored Persons is hereby changed to that of "The Kentucky Normal and Industrial Institute for Colored Persons," and its board of trustees shall be known as (The Board of Trustees of the Kentucky Normal and Industrial Institute for Colored Persons). That the presiding officer of the institute, who shall be selected by the board of trustees, shall be styled the "President of the Institute," and shall be the chief administrative officer of the institution, under the control of the board of trustees, and be ex-officio a member of the board of trustees, and hold his office indefinitely, at the will of the said board, but the superintendent shall have no vote in his own election or retention in office. (This section is an act of March 18, 1902.

§ 4528. **Department of Agriculture and Mechanics—Fund For.**—There shall be maintained in said institution a department for the education of colored students in agriculture and the mechanic arts, and for said purpose said board shall be entitled to receive an equitable division of the moneys arising from the sale of public lands, and appropriated to the State of Kentucky by an act of Congress, approved August 30, 1890, entitled "An act to apply a portion of the proceeds of public lands to the more complete endowment and support of the college for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress, approved July 2, 1862."

§ 4529. **Trustees—Powers Concerning Studies—Instructors and Teachers.**—Said board shall prescribe the course of study for the said normal school; shall select the instructors and fix their salaries, and shall determine the conditions, subject to the limitations hereinafter specified, on which pupils shall be admitted to the privileges of the school.

§ 4530. **Pupils—Terms of Admission Of.**—Any pupil to gain admission to the privileges of instruction in said normal school shall be at least sixteen years of age, possess good health, satisfactory evidence of good moral character, and sign a written pledge, to be filed with the principal, that said applicant will, as far as practicable, teach in the colored common schools of Kentucky a period equal to twice the time spent as a pupil in said normal school, together with such other conditions as the board may, from time to time, impose. But no such pledge shall be required of pupils who matriculate in the departments of agriculture or mechanics.

§ 4531. **Tuition—When Free to Pupils.**—Tuition in the said normal school shall be free to all colored residents of Kentucky who fulfill the conditions as set forth in the preceding section, and such other conditions as the board may require. The board shall fix the rate of tuition and the conditions on which pupils, who are not residents of Kentucky, may be admitted to the privileges of said normal school.

§ 4532. **Sectarian Teaching Forbidden.**—No religious tenets shall be taught in said normal school, but a high standard of Christian morality shall be observed in its management, and, so far as practicable, shall be inculcated in the minds of the pupils.

§ 4533. **Trustees to Visit School—Reports by to Leg-**

islature.—The board shall, in a body or by a majority of their number, visit said normal school once during each session, witness the exercises, and otherwise inspect the condition of said school, and they shall make a biennial report to the Legislature, setting forth the financial and scholastic condition of said normal school, making such suggestions as in their opinion would improve the same, and in the years in which there is no session of the Legislature they shall make their reports to the Governor.

§ 4534. **Appropriation For—Payment Of.**—The sum of three thousand dollars shall be annually appropriated out of the State Treasury to pay the teachers and defray other necessary expenses in the maintenance of said normal school, which amount, together with the sum received under the provisions of said act of Congress, shall be set apart and be known and held as the colored normal school fund. This fund shall be paid out of the State Treasury only on the warrant of the Auditor, drawn on the order of the board. (See, as to further appropriation for, sec. 4591a.)

§ 4534-A. **Appropriation For—Payment Of.**—That the sum of fifteen thousand dollars is hereby appropriated for the purpose of building a dormitory for the use of the female pupils of the State Normal School for Colored Persons, to be paid by the Auditor of Public Accounts out of any money in the treasury not otherwise appropriated on the written order of the chairman of the board of trustees, as the work progresses. The further sum of five thousand dollars annually is hereby appropriated for the support and conduct of said institution, to be paid by the Auditor of Public Accounts out of any money in the treasury not otherwise appropriated, on the written order of the chairman of the board of trustees at the

same time the other annual appropriation is paid. (This section is an act of March 20, 1902.)

§ 4535. **Certificates and Diplomas May be Granted by Board.**—The board is authorized to grant, from time to time, certificates of proficiency to such pupils as shall have completed the prescribed course of study in any department of the institution, and whose moral character and disciplinary relations to said school shall be satisfactory. And such teachers as shall have completed the prescribed course of study in the normal department, and exhibited satisfactory evidence of ability to instruct and manage a school, shall be entitled to diplomas appropriate to such degrees as the board shall confer upon them, which diplomas shall entitle them to teach in any of the colored common schools of this State.